Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

vs

GEORGE E. JONES, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,

Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

vs.

WILLIE A GRAHAM, AND DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RAY J. SCHOONHOVEN,
55 East Monroe Street,
Chicago, Illinois 60603,
Counsel for Petitioner, Newport News Shipbuilding and Dry Dock Company.

Of Counsel:
ROBERT H. JOYCE,
MARK A. LIES, II,
JUNIUS C. MCELVEEN, JR.,
KEITH C. HULT,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
55 East Monroe Street,
Chicago, Illinois 60603,
VINCENT E. EWELL,
Newport News Shipbuilding and Dry Dock Company,
4101 Washington Avenue,
Newport News, Virginia 23607.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	14

TABLE OF AUTHORITIES.

Cases.

Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F. 2d 176 (5th Cir. 1977) 11

Alford v. American Bridge Division, U. S. Steel Corporation, 7 BRBS 484 (Jan. 20, 1978) 11, 12

Anderson v. McBroom Rig Building Service, Inc., 5 BRBS 713 (April 7, 1978) 11

Bakke v. Duncanson-Harrelson Co., 8 BRBS 36 (Feb. 24, 1978) 11

Bradshaw v. J. A. McCarthy, Inc., 547 F. 2d 1161 (3d Cir. 1977), *vacated and remanded*, 97 S. Ct. 2967 (1977); *pet. rev. denied*, 564 F. 2d 89 (3d Cir. 1977) 10

Brady-Hamilton Stevedore Company v. Herron, 568 F. 2d 137 (9th Cir. 1978) 12

Buller v. American Bridge Division, U. S. Steel Corporation, 7 BRBS 481 (Jan. 19, 1978) 11, 12

Cantu v. American Bridge Division of U. S. Steel Corporation, 6 BRBS 133 (June 14, 1977) 11
Cargill, Inc. v. Powell, 573 F. 2d 561 (9th Cir. 1978)... 12
Carter v. Coast Marine Construction, Inc., 7 BRBS 26 (July 25, 1977)..... 12
Carroll v. Hullinghorst Industries, Inc., 7 BRBS 538 (Jan. 27, 1978) 10
Corbacho v. Sea-Land Service, Inc., 6 BRBS 362 (Oct. 30, 1977)..... 10
Crosson v. Vance, 484 F. 2d 840 (4th Cir. 1973) 9
Davis v. American President Lines, Ltd., 7 BRBS 622 (Jan. 24, 1978)..... 12
Dravo Corporation v. Banks, 567 F. 2d 593 (3d Cir. 1977) 7, 10
Dravo Corporation v. Maxin, 545 F. 2d 374 (3d Cir. 1976) *cert. denied*, 97 S. Ct. 2973 (1977)..... 10
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U. S. 249 (1972)..... 9
Foutz v. Ingalls Shipbuilding Division, Litton Systems, Inc., 7 BRBS 815 (Feb. 23, 1978)..... 10
Fuduli v. Maresca Boat Yard, 7 BRBS 982 (Feb. 28, 1978) 9
Hed v. Duncanson-Harrelson Co., 7 BRBS 821 (Feb. 24, 1978)..... 11
Hunter v. Duncanson-Harrelson Co., 8 BRBS 83 (March 30, 1978)..... 11
I. T. O. Corporation of Baltimore v. Benefits Review Board, 542 F. 2d 903 (4th Cir. 1977), *vacated and remanded*, 97 S. Ct. 2967 (1977)..... 10
Ingalls Shipbuilding Corporation v. Morgan, 551 F. 2d 61 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 508 (1977)... 11

Jacksonville Shipyards, Inc. v. Perdue, 539 F. 2d 533 (5th Cir. 1976)..... 7
Joyner v. Brown & Root, Inc., 7 BRBS 608 (Jan. 12, 1978) 11
Luker v. Ingalls Shipbuilding, 3 BRBS 321 (Mar. 19, 1976) 11
Maher Terminals, Inc. v. Farrell, 548 F. 2d 476 (3d Cir. 1977)..... 10
Maze v. Odum Construction Co., Inc., 7 BRBS 467 (Jan. 20, 1978)..... 10
McNeil v. Prolerized New England Company, 8 BRBS 1 (Mar. 20, 1978)..... 9
Michaelson v. H. W. Ramberg & Co., Inc., 7 BRBS 886 (Feb. 10, 1978)..... 9
Murphy v. General Dynamics Corporation, 7 BRBS 960 (Feb. 14, 1978)..... 9
Nacirema Operating Co., Inc. v. Johnson, 396 U. S. 212 (1969) 6
Northeast Marine Terminal Company, Inc. v. Caputo, 432 U. S. 249 (1977)..... 6
Onley v. South Carolina Electric & Gas Company, 488 F. 2d 758 (4th Cir. 1973)..... 9
Pinero v. United Terminals, Inc., 6 BRBS 340 (Aug. 19, 1977)..... 10
Pittston Stevedoring Corp. v. Dellaventura, 544 F. 2d 35, 39 (2d Cir. 1976), *aff'd. sub. nom.* Northeast Marine Terminal Co. v. Caputo, 432 U. S. 249 (1977)..... 5
Rowe v. DBR-8 Company, 7 BRBS 92 (Feb. 10, 1978).. 12
Scala v. Island City Iron & Supply, Inc., 6 BRBS 276 (Oct. 14, 1977)..... 11

Stewart v. Brown & Root, Inc., 7 BRBS 356 (Jan. 12, 1978) 11

Weyerhauser Co. v. Gilmore, 528 F. 2d 957 (9th Cir. 1976), *cert. denied* 429 U. S. 868 (1976) 8, 9, 12

Statutes.

Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. § 901 *et seq*..... 3

Longshoremen's and Harbor Worker's Compensation Act, 33, U. S. C. § 902(3) (1972) 3

Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. § 902(4) (1972)..... 3

Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. § 903(a) (1972)..... 2

Other Authorities.

Larson, *The Conflicts Problem Between the Longshoreman's Act and State Workmen's Acts under the 1972 Amendment*, 14 Hous. L. Rev. 287, 322 (1977)..... 5

Note, *Longshoremen, Longshoring Operations and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co.* v. *Caputo*, 64 Va. L. Rev. 99, 100 (1978)..... 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. .....

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

vs.

GEORGE E. JONES, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,

Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

vs.

WILLIE A GRAHAM, AND DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

OPINIONS BELOW.

These matters arise under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decisions and Order of the Administrative Law Judges are unreported

and are printed as Appendices "D" and "E" to this Petition. Both Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge appear as Appendices "B" and "C" hereto. The judgment and opinion of the Fourth Circuit Court of Appeals in the consolidated cases, decided March 13, 1978, affirming the Decision of the Benefits Review Board, have not been officially reported but is printed as Appendix "A" hereto.

JURISDICTION.

The judgment of the Fifth Circuit Court of Appeals was entered on March 13, 1978. A rehearing was not sought and the Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C., 1254(1).

QUESTIONS PRESENTED.

Whether the claimants were engaged in maritime employment as that concept was envisioned by Congress in the 1972 amendments to the Longshoremens' and Harbor Workers' Compensation Act?

STATUTE INVOLVED.

The relevant portion of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 3(a), 86 Stat. 1251, 1256, 33 U. S. C. § 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from the injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). * * *

Section 2(3), 86 Stat. 1251, 33 U. S. C. § 902(3):

> The term "employee" means only persons engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and a harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U. S. C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT OF THE CASE.

Willie A. Graham and George E. Jones were injured in separate accidents while working for Newport News Shipbuilding and Dry Dock Company (hereinafter Newport News Shipbuilding). This litigation concerns their claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972, 33 U. S. C. § 901, *et seq.* (hereinafter LHWCA).

Petitioner, Newport News Shipbuilding, the world's largest shipyard, is engaged in every aspect of the shipbuilding industry, as well as in many activities having no connection with shipbuilding. Naturally, some of its employees are involved in many of the routine support services that are performed in any production entity and which are not directly related to the construction of ships. Whether these support activities fall within the LHWCA is the central issue in the instant litigation.

On April 3, 1975 Willie Graham was employed by the Petitioner as a "chipper" in a land-based submarine shop which was located 1200 feet from the water's edge. The shop primarily fabricated component parts for nuclear reactors. Graham's duties generally consisted of cleaning castings and weldings of parts under construction by other employees. He did not assemble any component parts of a ship. On the day in question, Graham suffered a low back strain while removing a temporary alignment piece from a sonar shield which ultimately was installed in the reactor room of a submarine.

After receiving State compensation benefits, Graham applied for additional compensation benefits under LHWCA. The Administrative Law Judge and the Benefits Review Board held that Graham was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by the Act, and that the place of injury was "upon the navigable waters of the United States" as that term is defined in the 1972 Amendments to the Act.

On April 11, 1975 George Jones was employed by Petitioner as a mechanic's helper at its foundry located 3,000 feet from the water's edge. As a mechanic's helper, Jones was required to grease and oil various machines located throughout the foundry. He did not have any job functions in which he manufactured any products. Further, he was not required to perform any of his work on a vessel. As pointed out in the Fourth Circuit opinion, about 15 per cent of the foundry's work during April 1975 was for the shipyard's own repair and construction projects, and about 12 per cent involved ship-related work for a wholly-owned subsidiary, Newport News Shipbuilding Industrial Corp. The remaining 73 per cent involved production of non-maritime items for Newport News Industrial Corp.

After receiving State compensation benefits, Jones applied for additional compensation benefits under LHWCA. The Administrative Law Judge and the Benefits Review Board held that Jones was engaged in maritime employment at the time

of his injury and was thus an "employee" as defined in the 1972 Amendments to the Act.

The Fourth Circuit, after consolidating the cases, affirmed the orders of the Benefits Review Board awarding compensation. The Court initially found that the submarine shop and the foundry were integral parts of the shipyard thereby meeting the "situs" test. Thereafter, the Court went on to find that Graham was performing work on a component part of a ship and thereby was a "shipbuilder" within the meaning of the LHWCA. The Court found that Jones was performing maintenance work essential to keeping the shipyard's machinery in working order for the construction of ships and thereby determined he was a "shipbuilder" within the meaning of the Act.

REASONS FOR GRANTING THE WRIT.

The Circuit Courts of Appeal, the Benefits Review Board and Administrative Law Judges That Have Addressed the Issue of Maritime Employment Are in Conflict in Principle as to Its Definition and Application.

The jurisdictional reach of the LHWCA has been explicitly recognized by the courts[1] and commentators[2] as presenting a question of considerable import. Additionally, the fact that a substantial number of similar cases are pending which require extensive administrative as well as judicial energy clearly indicate that the question posed is recurring and timely.

Since their enactment, the precise extent of the coverage provided by the 1972 Amendments to LHWCA has proven

1. *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d 35, 39 (2d Cir. 1976), *aff'd. sub nom. Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S. 249 (1977).

2. See *Larson, The Conflicts Problem Between The Longshoremen's Act and State Workmen's Compensation Acts under the 1972 Amendment,* 14 Hous. L. Rev. 287, 322 (1977); Note, *Longshoremen, Longshoring Operations and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co.* v. *Caputo,* 64 Va. L. Rev. 99, 100 (1978).

troublesome for the Court and agencies charged with their application. The 1972 Amendments were a direct response to the invitation of this Court enunciated in *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U. S. 212 (1969). In *Nacirema,* this Court resolved a clear conflict among decisions interpreting the application of the pre-1972 LHWCA to injuries occurring to *longshoremen* injured on piers permanently affixed to land by finding that such injuries did not fall within the jurisdiction of the LHWCA. In reaching its decision, the Court stated that Congress, and not the Court, would have to extend the line of jurisdiction landward.

In order to correct an obvious inequity recognized by this Court wherein an injury would be compensable depending solely on the happenstance whether an employee was physically over navigable water at the time of injury, Congress enacted the 1972 Amendments to the LHWCA.

It is clear from the legislative history of the 1972 Amendments that the primary and overriding concern of Congress was to address the problems associated with *longshoring operations.* There is no definitive discussion concerning the application of the Amendments to unique situations involved in the shipbuilding industry. Further, there is no indication that Congress either intended or envisioned that the jurisdiction of the LHWCA would be extended to each and every employee of an employer who is engaged in the shipbuilding industry.

However, before *Northeast Marine Terminal Company, Inc.* v. *Caputo,* 432 U. S. 249 (1977), the various circuits had formulated numerous approaches to the problem. While this Court provided some guidance in *Caputo* regarding the application of the 1972 Amendments to the *longshoring industry,* the circuit courts and administrative agencies have remained in a judicial tempest regarding the application of these same Amendments to the *shipbuilding industry.* The proper and orderly development of the law requires that this Court now address

itself to the jurisdictional parameters of the Act regarding the shipbuilding industry.

In the instant case, the Fourth Circuit concluded that Jones was an "employee" within the meaning of LHWCA because the foundry itself was an integral part of the shipyard and because the maintenance work performed on machines was as essential to the utilization of the machinery as the work performed by the employees who actually utilize the machines. Graham was determined to be an "employee" because the Court found that he was performing work on a component part of a ship, although this activity did not include fabrication of such component. The Fourth Circuit's reasoning does not stand unchallenged.

The Third Circuit in *Dravo Corporation* v. *Banks,* 567 F. 2d 593 (3d Cir. 1977), denied benefits to an employee injured while performing ice removal operations as part of plant maintenance. The Court recognized that "plant maintenance" is required in *any* business and the fact that the employee was performing this work on behalf of an employer engaged in shipbuilding did not warrant jurisdiction, stating:

> "Banks' duties have no traditional maritime characteristics, but rather are typical of the support services performed in any production entity, maritime or not. 'Plant maintenance' is required in any business. The government's brief[3] inadvertently brings out a crucial distinction in this regard. After citing the 'integral part' test of *Maxin, supra,* it argues that Banks' function in clearing ice was 'a necessary *incident* to the entire process of vessel construction.' Clearing ice is a necessary 'incident' of *any* operation. We suggest that in order to be covered, Banks' job should have been a necessary *'ingredient'* in the shipbuilding process, which it was not.[4]" (Emphasis in original; footnotes omitted.) 567 F. 2d at 595-596.

In *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (5th Cir. 1976), the Fifth Circuit took another approach when it denied benefits to the employee (Skipper) who was engaged in

dismantling a fabrication shop. The Court looked to the *specific work activity* being performed by the employee at the time of injury and found that he was not performing ship repair work or any other activities which could be deemed "maritime employment" at the time of injury and, therefore, jurisdiction was lacking.

The Ninth Circuit has also addressed itself to this issue in *Weyerhauser Co.* v. *Gilmore*, 528 F. 2d 957 (9th Cir. 1976), *cert. denied*, 429 U. S. 865 (1976). In *Weyerhauser*, the Court denied benefits under the LHWCA to an employee who was injured while working as a "pondman" wherein he was required to sort logs and feed them into a lumbermill while moving about on walkways and on logs floating in a saltwater bay of the Pacific Ocean. In rendering its decision, the Court clearly described the essential elements for jurisdiction under the LHWCA, stating:

> "In expanding the maritime situs element of the Act, however, Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area. 528 F.2d at 960.
>
> * * * * *
>
> "[3] The 1972 amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; *i.e.*, the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.'

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. *See Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). *See also Onley* v. *South Carolina Electric & Gas Company*, 488 F.2d 758 (4th Cir. 1973), and *Crosson* v. *Vance*, 484 F.2d 840 (4th Cir. 1973)." (Emphasis in original.) 528 F.2d at 961.

The court clearly rejected the reasoning that any injury occurring within an area adjoining the employer's operations was a sufficient "situs" for purposes of coverage and that any employment activity was sufficient to satisfy the required "status" of maritime employment so as to warrant jurisdiction.

The decisions in *Weyerhauser, Banks* and *Perdue* (Skipper) have been rejected by the instant Court of Appeals as well as by the courts of appeals and by the Benefits Review Board and the Administrative Law Judges.[3]

---

3. *First Circuit:*

Benefits awarded:

McNeil v. *Prolerized New England Company*, 8 BRBS 1 (Mar. 20, 1978) (claimant repairing conveyor belt used to move scrap metal into mill where scrap processed in mill before loading on vessels by other employees); *Murphy* v. *General Dynamics Corporation*, 7 BRBS 960 (Feb. 14, 1978) (decedent operating sandblaster conveyor machine used to clean metal plates so that plates could be printed, labelled and made part of ship).

Second Circuit:

Benefits awarded:

Michaelson v. *H. W. Ramberg & Co., Inc.*, 7 BRBS 886 (Feb. 14, 1978) (claimant injured while grinding pin for container lift used to load and unload vessels); *Fuduli* v. *Maresca Boat Yard*, 7 BRBS 982 (Feb. 28, 1978)

(Footnote continued on next page.)

A review of the foregoing decisions reveals that a clear conflict exists between the decisions of the Circuit Courts of Appeals, Benefits Review Board and Administrative Law Judges as to the tests to be applied in determining whether a claim falls within the jurisdiction of the LHWCA. The Third and

(Footnote continued from preceding page.)

(claimant, employee of repair service, injured while painting pleasure vessel weighing less than 18 tons).

Third Circuit:

Benefits awarded:

Corbacho v. *Sea-Land Service, Inc.*, 6 BRBS 362 (Oct. 30, 1977) (claimant preparing to install stoplight in cargo moving equipment in terminal); *Pinero* v. *United Terminals, Inc.*, 6 BRBS 340 (Aug. 19, 1977) (claimant performing office cleaning duties); *Dravo Corporation* v. *Maxin*, 545 F. 2d 374 (3d Cir. 1976) *cert. denied*, 97 S. Ct. 2973 (1977) (claimant, working at structural steel shop, burning steel plates ultimately to be used in barge); *Bradshaw* v. *J. A. McCarthy, Inc.*, 547 F. 2d 1161 (3d Cir. 1977), *vacated and remanded* 97 S. Ct. 2967 (1977), *pet. rev. denied*, 564 F. 2d 89 (3d Cir. 1977) (claimant, mechanic, removing tire from forklift).

Benefits denied:

Maher Terminals, Inc. v. *Farrell*, 548 F. 2d 476 (3d Cir. 1977) (claimant, clerk in maritime terminal office, who handled documents); *Dravo Corporation* v. *Banks*, 567 F. 2d 593 (3d Cir. 1977) (claimant, maintenance man, removing ice from walkways at shipyard).

Fourth Circuit:

Benefits denied:

I. T. O. Corporation of Baltimore v. *Benefits Review Board*, 542 F. 2d 903 (4th Cir. 1977); *vacated and remanded*, 97 S. Ct. 2967 (1977) (claimants forklift and "hustler" operations).

Fifth Circuit:

Benefits awarded:

Maze v. *Odum Construction Co., Inc.*, 7 BRBS 467 (Jan. 20, 1978) (claimant repairing temporary dock); *Carroll* v. *Hullinghorst Industries, Inc.*, 7 BRBS 538 (Jan. 27, 1978) (claimants constructing scaffold for other workers to use to repair cargo handling device); *Foutz* v. *Ingalls Shipbuilding Division, Litton Systems, Inc.*, 7 BRBS 815 (Feb. 23, 1978) (claimant grinding panels after weld-

(Footnote continued on next page.)

Ninth Circuits are in conflict with the Fourth Circuit, while the Fifth Circuit has seemingly ruled both ways.

A striking example of the developing confusion in this area is indicated by a review of decisions of the Fifth Circuit Court of Appeals in *Ingalls Shipbuilding Corporation* v. *Morgan*, 551 F. 2d 61 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 508 (1977)

(Footnote continued from preceding page.)

ing); *Luker* v. *Ingalls Shipbuilding*, 3 BRBS 321 (Mar. 19, 1976) (claimant, carrying payroll cards, tripped over t-bar); *Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356 (Jan. 12, 1978) (claimant, employee of independent contractor engaged in building dry dock for shipyard, awarded benefits while injured loading truck with machinery 100 feet from water's edge); *Joyner* v. *Brown & Root, Inc.*, 7 BRBS 608 (Jan. 12, 1978) (claimant, employee of independent contractor reclaiming river bottom land for shipyard, awarded benefits for fatal injury occurring over reclaimed area); *Alabama Dry Dock & Shipbuilding Co.* v. *Keniness*, 554 F. 2d 176 (5th Cir. 1977) (claimant sandblasting a disassembled crane to prevent rust from occurring while crane in storage).

Benefits denied:

Alford v. *American Bridge Division, U. S. Steel Corporation*, 7 BRBS 484 (Jan. 20, 1978) (claimant welding a nodule); *Anderson* v. *McBroom Rig Building Service, Inc.*, 5 BRBS 713 (Apr. 7, 1978) (claimant roust-about on oil rig); *Scala* v. *Island City Iron & Supply, Inc.*, 6 BRBS 276 (Oct. 14, 1977) (claimant dismantling dry dock); *Buller* v. *American Bridge Division, U. S. Steel Corporation*, 7 BRBS 481 (Jan. 19, 1978) (claimant placed and fit pieces of steel onto other pieces of steel); *Cantu* v. *American Bridge Division of U. S. Steel Corporation*, 6 BRBS 133 (June 14, 1977) (claimant attempting to move a metal navigational sign which he welded).

Ninth Circuit:

Benefits awarded:

Hed v. *Duncanson-Harrelson Co.*, 7 BRBS 821 (Feb. 24, 1978) (claimant working on a piling for a dock being constructed for unloading oil tankers); *Bakke* v. *Duncanson-Harrelson Co.*, 8 BRBS 36 (Feb. 24, 1978) (claimant repairing a dock at which ships were berthed); *Hunter* v. *Duncanson-Harrelson Co.*, 8 BRBS 83 (March 30, 1978) (claimant repairing and reconstructing a wharf

(Footnote continued on next page.)

and the Benefits Review Board in several recent decisions arising out of the Fifth Circuit. In *Morgan*, the Court found that an employee who performed all of his welding activities in a shore-based fabrication shop and who never went aboard a vessel was entitled to benefits for a fatal injury when a piece of steel plate fell upon him. The particular piece of steel on which the decedent was working would subsequently be handled by other employees who performed additional work after which the piece would be taken to another location for installation in a vessel. The Court found that the decedent was engaged in shipbuilding, despite the fact that decedent never performed any work aboard ship or assembled the component parts.

In *Alford* v. *American Bridge Division, U. S. Steel Corporation*, 7 BRBS 484 (Jan. 20, 1978) and in *Buller* v. *American Bridge Division, U. S. Steel Corporation*, 7 BRBS 481 (Jan. 19, 1978), the claimants were engaged in identical work activities as in *Morgan* involving fabrication of component parts of vessels for an independent contractor, which parts would thereafter be assembled by a shipyard into a vessel. The Benefits Review Board denied benefits, holding that neither of the claim-

(Footnote continued from preceding page.)

previously used to load and unload tankers); *Davis* v. *American President Lines, Ltd.*, 7 BRBS 622 (Jan. 24, 1978) (claimant injured while maintaining gear for lashing cargo to ship docks); *Brady-Hamilton Stevedore Company* v. *Herron*, 568 F. 2d 137 (9th Cir. 1978) (claimant maintained stevedore equipment); *Rowe* v. *DBR-8 Company*, 7 BRBS 92 (Feb. 10, 1978) (claimant maintained barge machinery).

Benefits denied:

Cargill, Inc. v. *Powell*, 573 F. 2d 561 (9th Cir. 1978) (claimant operated device used for unloading grain from railroad cars and conveying it to the employer's bins from which it would be loaded into vessels); *Weyerhaeuser Company* v. *Gilmore*, 528 F. 2d 957 (1976), *cert. denied*, 429 U. S. 868 (1976) (claimant sorting logs and feeding them into lumber mill from processing); *Carter* v. *Coast Marine Construction, Inc.*, 7 BRBS 26 (July 25, 1977) (claimant injured while affixing timbers to concrete piling for constructing an addition to an ore dock).

ants were shipbuilders nor were they engaged in maritime employment under the LHWCA.

The Petitioner submits that this marked inconsistency between the decisions as to what constitutes "shipbuilding" and "maritime employment" clearly illustrates the confusion in this area. If the claimants in *Alford* and *Buller* are not engaged in "shipbuilding" or "maritime employment," then neither were Jones and Graham.

The Petitioner contends that the foregoing examples of the disarray which is occurring between the various Courts of Appeals and the administrative bodies charged with interpreting the LHWCA manifestly illustrates the necessity for prompt and complete determination of these issues by this Court. The lines of conflict on the issue have been clearly established. The conflicting decisions and dicta within the circuits have brought about an anomalous situation wherein a shipbuilder's liability under the LHWCA depends upon the particular tribunal which determines the issues and not upon settled principles of law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

RAY J. SCHOONHOVEN,
55 East Monroe Street,
Chicago, Illinois 60603,
Counsel for Petitioner, Newport News Shipbuilding and Dry Dock Company.

Of Counsel:
ROBERT H. JOYCE,
MARK A. LIES, II,
JUNIUS C. MCELVEEN, JR.,
KEITH C. HULT,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
55 East Monroe Street,
Chicago, Illinois 60603,

VINCENT E. EWELL,
Newport News Shipbuilding and Dry Dock Company,
4101 Washington Avenue,
Newport News, Virginia 23607.

APPENDIX A.

UNITED STATES COURT OF APPEALS.
for the Fourth Circuit.

No. 76-2297

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs.

WILLIE A. GRAHAM,
Respondent.

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Intervenor.

No. 77-1100

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND GEORGE E. JONES,
Respondents.

On Petitions for Review of Orders of the U. S. Department of Labor

Argued January 10, 1978 Decided March 13, 1978

Before HAYNSWORTH, *Chief Judge,* and BUTZNER and HALL, *Circuit Judges.*

Robert H. Joyce (Luther G. Jones, III, Seyfarth, Shaw, Fairweather & Geraldson; William McL. Ferguson, Shannon T. Mason, Jr., Ferguson & Mason on brief) for petitioner; Linda L. Carroll, attorney, U. S. Department of Labor (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor and Francine K. Weiss, attorney, U. S. Department of Labor on brief) for respondent Director, Office of Workers' Compensation Programs; (Stuart R. Gordon, Howell, Anninos, Daugherty and Brown on brief) for respondent Willie A. Graham in 76-2297.

BUTZNER, *Circuit Judge:*

Willie A. Graham and George E. Jones were injured in separate accidents while working for the Newport News Shipbuilding and Dry Dock Co. Both employees claimed compensation for their injuries under the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972, 33 U. S. C. §§ 901, *et seq.* In these consolidated cases, Newport News Shipbuilding seeks to set aside the orders of the Benefits Review Board awarding compensation to both claimants. We deny the petitions and affirm the Board.

Under the 1972 amendments to the Act, eligibility for benefits depends on the situs of the worker's injury and his status. To be compensable, injuries to covered employees must occur,

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. § 903(a).

Eligible employees are those,

> engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The claimant must satisfy both of these statutory requirements. Northeast Marine Terminal Co. v. Caputo, 432 U. S. 249, 265 (1977).

I.

Graham worked as a "chipper" in a submarine shop which was located 1200 feet from the water. The shop primarily fabricated component parts for nuclear reactors. As a chipper, Graham's duties generally consisted of using a chipping hammer to clean castings and welds. He suffered a lower back strain while removing a temporary alignment piece from a sonor shield. (Although the submarine shop does some work for land based reactors, the sonor shield Graham worked on was installed in the reactor room of a submarine being constructed in a shipway approximately 1900 feet from the shop. Graham's duties did not include actually installing parts on ships.)

Jones had worked in the shipyard for longer than 25 years. He was rated as a mechanic and belonged to the maintenance department. (Jones dislocated his shoulder when he bumped against a sandmill machine while greasing it. Although he had been assigned to oil machinery in the foundry for the last four or five years, members of the department work throughout the shipyard. In the past, Jones has worked on the waterfront and aboard ship. During the month of Jones's injury, about 15 per cent of the foundry's work was for the shipyard's own ship repair and construction projects, and about 12 per cent involved ship related work for a wholly owned subsidiary, Newport News Industrial Corp. The remaining 73 per cent involved production of non-maritime items for Newport News Industrial Corp.)

II.

Both claims meet the Act's situs test. The submarine shop and the foundry are integral parts of the shipyard even though they are located 1200 feet and 3000 feet respectively from the water's edge. Other cases have held that injuries sustained in a

carpentry shop located 300 feet from water and in a structural steel shop located 2000 feet from water were covered under the Act. Halter Marine Fabricators, Inc. v. Nulty, *reported sub nom.*, Jacksonville Shipyards, Inc. v. Perdue, 539 F. 2d 533, 543 (5th Cir. 1976); Dravo Corp. v. Maxin, 545 F. 2d 374, 381 (3d Cir. 1976). The steel shop in *Maxin*, like the foundry and submarine shop in this case, was not devoted exclusively to ship related work. Relying on these precedents, we hold that the submarine shop and the foundry are included in the statutory concept of "navigable waters of the United States" because they are located in an area adjoining such waters "customarily used by an employer in . . . repairing, or building a vessel." 33 U. S. C. § 903(a).

III.

Both claims also meet the Act's status test. At the time of his injury, Graham was clipping a sonar shield that was later installed in a submarine. After careful analysis of the Act, other courts have ruled that an employee who works in a fabrication shop on component parts of ships is a shipbuilder. *See, e.g.*, Ingalls Shipbuilding Corp. v. Morgan, 551 F. 2d 61, 62 (5th Cir. 1977) (employee killed while cleaning a steel plate that would later be used for construction or repair of ships); Jacksonville Shipyards, Inc. v. Perdue, 539 F. 2d 533, 543-44 (5th Cir. 1976) (carpenter injured while building a piece of woodwork for installation on a new ship); Dravo Corp. v. Maxin, 545 F. 2d 374, 376 (3d Cir. 1976) (employee injured while burning steel plates which would ultimately become bottoms and decks of barges). Since Graham was engaged in an integral part of the submarine's construction, he meets the status test.

At the time of Jones's injury, he was oiling a machine used in building ships. Precedent supports the conclusion that he, too, was a maritime employee as defined in 33 U. S. C. § 902(3). In Bradshaw v. McCarthy, 3 BRBS 195 (1976), *petition for review denied*, 547 F. 2d 1161 (3d Cir. 1977), a

mechanic injured his back in a marine terminal while removing a tire from a forklift that was used in longshoring operations. The Board said:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment. 3 BRBS at 198.

The Fifth Circuit suggests that an employee meets the status test if he is "directly involved" in the work of building a ship even though he does not actually perform that work himself. Jacksonville Shipyards, Inc. v. Perdue, 539 F. 2d 533, 539-40 (5th Cir. 1976). Applying this principle in Alabama Dry Dock and Shipbuilding Co. v. Kininess, 554 F. 2d 176, 178 (5th Cir. 1977), the court held that an employee injured while sandblasting a disassembled crane was entitled to compensation under the Act because "[m]aintenance of the crane was necessary to enable it to perform its eventual function of hauling fabricated ship sections to the water's edge."

Jones's job is significantly different from those involved in two recent decisions denying benefits. In Dravo Corp. v. Banks, ... F. 2d ..... (3d Cir. 1977), the court held that an unskilled laborer who was injured while spreading salt on ice was not covered under the Act. Banks's job lacked the close, functional relationship that existed between Jones's job and the operation of machinery used in building ships. Jones's maintenance work was as essential to the utilization of the machinery as the work of machine operators. Banks's connection to production was tenuous. Even more tenuous was the connection between production and the work of the clerical employee denied benefits in Maher Terminals, Inc. v. Farrell, 548 F. 2d 476 (3d Cir. 1977).

Because Jones's maintenance was essential to keeping the shipyard's machinery in working order for the construction of

ships, we conclude that he was a shipbuilder within the meaning of the Act.

The shipyard argues that even if Jones qualifies under the Act, the admiralty and maritime clause of the Constitution, Art. III, § 2, Cl. 1, does not confer power on Congress to extend coverage to him. Similar arguments recently have been rejected by other courts. *See, e.g.*, Dravo Corp. v. Maxin, 545 F. 2d 374, 375 (3d Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F. 2d 35, 56-57 (2d Cir. 1976); Sea-Land Service, Inc v. Director, 540 F. 2d 629, 635-37 (3d Cir. 1976); Jacksonville Shipyards, Inc. v. Perdue, 539 F. 2d 533, 544-46 (5th Cir. 1976). For reasons fully expressed in these opinions, we conclude that Congress acted constitutionally when it extended the Act's coverage to an employee maintaining machinery utilized to build ships in a shipyard adjoining navigable waters even though his shop was relatively distant from the shore.

IV.

We find no error in the assessment and computation of a penalty, for the shipyard failed either to compensate Jones under the Act or to file a notice controverting his right to compensation within 14 days after it learned of his injury as required by 33 U. S. C. § 914(e). The penalty is mandatory unless nonpayment is due to conditions beyond the employer's control. The administrative law judge did not abuse his discretion by relieving Jones of his counsel's improvident stipulation, which was made at the suggestion of the shipyard's attorney, that all notices had been timely filed. We also find no error in the allowance of interest.

After oral argument, Graham's attorney moved for the allowance of a fee, setting forth in an itemized statement the dates on which he had performed specified services and the hours expended each day. Counsel for the shipyard opposed the request, complaining that both the rate per hour and the number of hours were excessive.

Title 33 U. S. C. § 928(a) directs the court to award attorneys' fees to counsel for a successful complainant whose employer has denied liability for compensation. To implement this statute we have decided to follow the procedure suggested by Judge Gibbons in Atlantic & Gulf Stevedores, Inc. v. Director, 542 F. 2d 602, 610 (3d Cir. 1976). After a panel of the court has announced its decision on the merits of the petition for review, it will consider a verified motion for allowance of fees. A copy of the motion should be furnished the employer's counsel who will be afforded an opportunity to respond. Ordinarily the panel will determine the award without oral argument or reference to a master. The panel will consider the attorney's professional qualifications, the time he spent in preparation and presentation of the case, his regular billing rate, the fees allowed by the administrative law judge and the Board, and the amount of the recovery. The motion should provide all of this information. In addition, the court will consider the complexity of the issues, the support to the claimant afforded by the Director, the quality of counsel's services, comparable billing rates, other matters it deems pertinent, and those called to its attention by either the motion or the response.

Graham's attorney has complied substantially with this procedure, and the employer has fully responded. Therefore, no purpose would be served by requiring another submission. We find nothing lacking in the attorney's services; nevertheless, we have concluded that he is not entitled to the full amount which he requested. He presented the same issues to the administrative law judge and the Benefits Review Board, and he has already been awarded attorney's fees from these agencies. While his research had to be updated and a brief prepared, much of his argument was necessarily a repetition of what he said in the administrative proceedings. Moreover, the employee's recovery is small, and the Director provided substantial assistance. Con-

sidering all of these factors, we believe that a fee in the amount of $750 is appropriate. Counsel should apply to the clerk for taxation of printing costs. Federal Rule of Appellate Procedure 39.

The petitions to set aside the awards are denied and the orders of the Board affirmed.

APPENDIX B.

WILLIE A. GRAHAM,
Claimant-Respondent,

vs.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY,
Self-Insured Employer-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

BRB No. 76-236

DECISION

Syllabus

Digest
Section

1806 A Longshoremen's Act claimant injured while building on land a part to be assembled onto a submarine located 1900 feet away was then engaged in maritime commerce within the meaning of Act Section 2(3).

1809 An area in which ship components are built and which adjoins navigable waters is a maritime situs within the meaning of Longshoremen's Act Section 3(a), since the building of ship components amounts to shipbuilding.

Appeal from the Decision and Order of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Stuart R. Gordon (Howell, Anninos, Daugherty & Brown), Norfolk, Virginia, for the claimant.

Luther G. Jones, III (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D. C., for the employer.

Francine K. Weiss (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer from a Decision and Order (76-LHCA-326) of Administrative Law Judge Julius A. Johnson pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereafter referred to as the Act).

Claimant was employed as a chipper in employer's submarine shop located twelve hundred feet from the James River. The submarine shop was used primarily for the building of component parts from raw and fabricated materials. Claimant sustained a lower back injury on April 3, 1975, while removing an alignment piece from a sonar shield, preparatory to the sonar shield's installation on a submarine in a shipway, located approximately 1900 feet away. Claimant was paid compensation for total disability under the Virginia workmen's compensation act.

The administrative law judge found claimant to be covered by the Act and awarded compensation for temporary total disability from April 17, 1975 to April 20, 1975, and from June 28, 1975 to July 27, 1975.

Employer appeals contending that the claim is not within the jurisdiction of the Act in that claimant met neither the status nor situs requirements. 33 U. S. C. §§ 902(3), 903(a).

The Board agrees with the administrative law judge's determination that claimant is an employee under Section 2(3) of the Act. 33 U. S. C. § 902(3).

Section 2(3) of the Act defines an employee as:

> . . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and, any harbor-worker including a ship repairman, *shipbuilder,* and ship-breaker. . . . (emphasis added)

Employer argues that a person who is involved in the construction of component parts which are later incorporated into a vessel is not a shipbuilder under the Act. The Board has consistently held that where employer is in the business of ship construction or repair, and claimant is among those employees whose work directly contributes to this construction or repair, claimant's activity is to be considered maritime employment under the Act. *See Luker* v. *Ingalls Shipbuilding Corp.,* 3 BRBS 321, BRB No. 75-243 (March 19, 1976); *Morgan* v. *Ingalls Shipbuilding Corp.,* 3 BRBS 310, BRB No. 75-159 (March 19, 1976).

The Fifth Circuit has adopted this view in affirming the Board's decision in *Nulty* v. *Halter Marine Fabricators, Inc.,* 1 BRBS 437, BRB 74-179 (May 2, 1975), *aff'd,* No. 75-2317, (5th Cir. Sept. 27, 1976). In that case, claimant worked as a carpenter in employer's fabrication shop. At the time of injury, he was building a piece of woodwork which would be later installed by shipfitters aboard a vessel. The court found that the only reasonable conclusion was that claimant was directly involved in an ongoing shipbuilding operation and, hence, a shipbuilder.

In the instant case, claimant was working as a chipper on a component part, specifically a sonar piece, prior to its installation aboard ship. Without claimant's operation, the sonar piece would not be installed aboard the ship. Clearly, claimant was directly involved in an ongoing shipbuilding operation, and, therefore, a shipbuilder under the Act.

The Board also agrees with the administrative law judge's determination that the injury occurred at a situs covered under the Act.

Section 3(a) of the Act provides that the death or disability must result from:

> . . . an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Employer argues that the situs of the injury was not in an adjoining area customarily used for building a vessel in that the construction of component parts is not shipbuilding. The Fifth Circuit in *Nulty* v. *Marine Fabricators, Inc., supra,* concluded that Nulty, a carpenter in a fabrication shop, was indeed engaged in shipbuilding, and that Congress could reasonably have felt that employees like Nulty were performing a sufficiently maritime function to be covered by the amended Act. Likewise, in *Maxin* v. *Dravo Corp.,* 2 BRBS 373, BRB No. 75-145 (Oct. 20, 1975), the Board concluded that a burner in a structural shop where components of barges and towboats were assembled was indeed building a vessel. The Board also noted that the term adjoining area for purposes of the Act is to be deemed bounded only by its use as a maritime enterprise. In this case, although the submarine shop was 1200 feet from the James River, it clearly played an integral part in employer's shipbuilding enterprise and thus qualifies as an adjoining area under the Act.

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20 C. F. R. §§ 702.132, 802.203, claimant's attorney is awarded a fee of $60.00 to be paid by the employer in a lump sum directly to claimant's attorney. 33 U. S. C. § 928.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

Dated this 28th day of October, 1976.

APPENDIX C.

GEORGE E. JONES,
Claimant-Respondent,

vs.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Self-Insured Employer-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

BRB No. 76-320

DECISION

Syllabus

Digest Section		Page
1809	A foundry which is within a shipyard and separated from other yard facilities by public roads, is 3000 feet from the water's edge, and devotes no more than 24.2 percent of its production to ship construction and repair, is nevertheless a maritime site within the meaning of Longshoremen's Act Section 3(a)	329
1806	A Longshoremen's Act claimant engaged in maintaining machinery necessary for producing parts for ship construction and repair was then engaged in maritime employment within the meaning of Longshoremen's Act Section 2(3)	329
2054	An employer's contention that interest payable pursuant to Longshoremen's Act Section 14(d) is not owed for periods of delay in the claim adjudication process attributable to the Director, OWCP, or to the administrative law judge is without merit	332

Appeal from the Decision and Order of Charles F. Simon, Administrative Law Judge, United States Department of Labor.

H. Duncan Garnett, Jr. (Jones, Blechman, Woltz & Kelly), Newport News, Virginia, for the claimant.

Luther G. Jones, III (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D. C., William McL. Ferguson and Shannon T. Mason, Jr. (Ferguson & Mason), Newport News, Virginia, for the self-insured employer.

Francine K. Weiss (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the self-insured employer from a Decision and Order (76-LHCA-78) of Administrative Law Judge Charles F. Simon awarding compensation pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereafter referred to as the Act).

On April 11, 1975, while raising up from greasing a sand mill or sand mixer in the employer's foundry, claimant struck his left shoulder against part of the equipment. His shoulder was dislocated and resulted in temporary total disability from the date of injury through May 18, 1975, and a ten percent permanent partial loss of the use of the left arm. The nature of the injury and the extent of the resulting disability are not contested. Newport News Shipbuilding and Dry Dock Company (hereafter Newport or the employer) provided compensation and medical care pursuant to the Virginia statute.

Claimant, born March 14, 1918, has worked for the employer for over 25 years. For the four or five years preceding this injury, he has performed duties lubricating the machinery

in the shipyard foundry. Although assigned to the employer's maintenance department, he is a member of the Peninsula Shipbuilder's Association, the union which represents all of the employer's hourly production workers.

The employer's foundry makes all types of castings for the repair and construction of ships. It is located within the employer's shipyard which is one of the world's largest. The foundry is approximately two and one-half blocks or 3000 feet from water. Although the foundry is separated from the water's edge by two public streets, it is also linked to the water's edge by a rail spur and a system of underpasses.

In addition to making castings for use in the employer's ship construction and repair business, the foundry also produces various items for the Newport News Industrial Corporation (NNI) which is a wholly owned subsidiary of the employer. Foundry work performed for NNI is billed to it at cost. Only 27.2 percent of the work performed in the foundry during the month when claimant was injured, whether done directly for the employer (14.8 percent) or under the arrangement with NNI (12.4 percent), was ship related. The remainder of the foundry's work was devoted to non-marine items for NNI.

The employer having denied jurisdiction under the Act, the case was heard before the administrative law judge who found that claimant had the status of an "employee" under Section 2(3) of the amended Act, 33 U. S. C. § 902(3), who had been injured at a situs included in Section 3(a) of the amended Act, 33 U. S. C. § 903(a). There is no dispute that at least part of the employer's activities make it a covered "employer" under Section 2(4), 33 U. S. C. § 902(4), of the amended Act. Having thus concluded that the claim came within the purview of the Act, as amended, the administrative law judge awarded compensation, medical care, interest, penalty and attorney's fees to the claimant and allowed the employer a credit for the sums already paid under the state statute.

On appeal, the employer raises three issues:

a. Whether any person who participates in the formation of parts which may or may not be later incorporated into a vessel is engaged in "maritime employment" as a "shipbuilder."

b. Whether the adjoining area, the foundry, in which the employee works, is an area "customarily" used in repairing or building a vessel.

c. Whether the employer should be assessed the fine pursuant to Section 14(e) of the Act.

Several major recent decisions are relevant to the case before us. Most important among these is the Fourth Circuit's rehearing of several consolidated cases defining the landward extension over longshoring activities brought about by the 1972 amendments to the Act. *I. T. O. Corporation of Baltimore* v. *Benefits Review Board*, 542 F. 2d 903 (4th Cir. 1976) (hereafter, *Adkins II*), replacing *I. T. O. Corporation of Baltimore* v. *Benefits Review Board*, 529 F. 2d 1080 (4th Cir. 1975) (here after, *Adkins I*). Further, the two neighboring circuits, the Fifth and Third, have recently ruled upon cases closely analogous to that now before us. *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (5th Cir. 1976) and *Dravo Corporation* v. *Maxin*, No. 75-2403 (3rd Cir. November 15, 1976).

Although the Fourth Circuit's decisions in *Adkins* concerned longshoring rather than shipbuilding, several general propositions concerning the court's construction of the landward extension of coverage under the 1972 amendments to the Act may be derived from them. First, contrary to the primary contention in the employer's brief, coverage is not limited solely to those employees who were previously covered for part of their activities under the unamended Act. See *Adkins I*, 529 F. 2d at 1081, 1088. Second, they have not adopted the employer's contention that the term "adjoining areas" should be construed narrowly, but rather expressed "no doubt that each of the claimants satisfies the situs test of the post-1972 Act," *id.* at 1083-1084, even

though their injuries were sustained as much as 850 feet from the water's edge. Third, the general nature of the injured worker's duties and the usual place of their performance are not dispositive under the Act. The test is whether the claimant was engaged in "maritime employment" at a covered situs at the moment of injury. *Id.* at 1081, 1084, 1088 n. 4. Our review of *Adkins II* reveals no change in the court's view of any of these issues.

This Board has consistently held that workers employed at a shipbuilding facility who were injured while engaged in the fabrication or preparation of components for installation upon a ship are covered under the amended Act. This interpretation was adopted by the Fifth Circuit in *Perdue, supra, aff'g Nulty* v. *Halter Marine Fabricators, Inc.*, 1 BRBS 437 BRB No. 74-179 (May 2, 1975). Accordingly, we have recently held that a worker engaged in preparing a sonar shield for installation on a submarine who was injured in the Newport submarine shop located 1200 feet from the James River was covered under the amended Act. *Graham* v. *Newport News Shipbuilding & Dry Dock Company*, 5 BRBS 7, BRB No. 76-236 (October 28, 1976).

The Third Circuit's recent decision in *Dravo, supra, aff'g* 2 BRBS 372, BRB No. 75-145 (October 20, 1975), is even more closely analogous to the case now before us. In *Dravo* the claimant was injured in the employer's structural steel shop which prepared steel plates for incorporation into barges assembled in another part of the employer's facility. The court did not find that the facts that the shop was located 2,000 feet from water, separated from other parts of the employer's facility by a public street and not devoted exclusively to the fabrication of components used in marine construction were sufficient to exclude it from the covered situs provisions of Section 3(a).

The Fifth Circuit having found a carpentry shop located 300 feet from the water's edge to be a covered situs and the Third Circuit also having found a structural steel shop located 2000

feet from the water's edge to be a covered situs, the Board is not inclined to exclude a foundry located 3000 feet from the water from the same coverage. The one major distinction between the instant case and *Dravo* is that in *Dravo* the majority (85 percent) of the shop's activity was marine construction; here about one-fourth of the foundry's work product was marine related and only one-seventh of it was for use in the employer's own shipbuilding and repairing activities.

The administrative law judge, however, found, "It is obvious from the photographs and the testimony that Employer's shipyard is a unified, integrated complex of buildings, etc., devoted to marine construction. The different areas are contiguous and adjacent to each other in spite of their being intersected by public streets." (D & O, p. 5). He further found, "Employer's own witness testified that the work done by the foundry is a necessary and essential part of Employer's shipbuilding operation (Tr. 105). The end products of the foundry are essential parts of ships. . . ." (D & O, p. 7). "The foundry makes all kinds of castings for the repair and building of ships [and] . . . also produces HY 80, one of the hardest of metals, for use in construction of the new Trident submarines." (D & O, p. 3). Having thus concluded that the products of the foundry were necessary to the employer's shipbuilding and ship repairing operations, he concluded that the fact that non-ship-related work was also performed at the foundry was not sufficient to remove it from the coverage of the amended Act. Joint Exhibit No. 9 indicates that the foundry has been a part of the shipyard's operation since 1902. Upon these facts, we cannot conclude that the administrative law judge erred in finding the foundry to be an "adjoining area customarily used by an employer in . . . repairing, or building a vessel" within the meaning of Section 3(a) of the Act, as amended. Accordingly, the second issue raised in the employer's appeal must be answered in the affirmative and the foundry held to be a covered situs under the amended Act.

On the issue of the "status" of the claimant, we note that although he was a member of the local production workers union, he was normally assigned to maintenance duties and was, in fact, engaged in maintaining foundry equipment at the moment of injury. This Board has previously held a shipyard worker injured in the course of maintaining equipment to be engaged in "maritime employment" as a shipbuilder when such equipment was utilized in the employer's shipbuilding and repairing operations. *Kininess* v. *Alabama Dry Dock and Shipbuilding Company,* 4 BRBS 13, BRB No. 75-275 (May 18, 1976).

The administrative law judge having found upon the evidence before him that "Claimant's task of maintaining in operating order, machinery necessary for continued formation of essential parts for ship repair and new ship construction, is an essential part of Employer's maritime building operations" (D & O, p. 7), we affirm his finding that claimant was engaged in "maritime employment" as a shipbuilder or ship repairman within the meaning of Section 2(3) of the Act, as amended. Accordingly, the first issue raised by the employer on appeal must also be answered in the affirmative and claimant be held to have occupied a covered status under the amended Act at the time of his injury.

Having thus found the claimant to be covered under the Act, we must next consider the final issues on appeal: Whether the administrative law judge properly assessed against the employer additional amounts pursuant to Section 14(e), 33 U. S. C. § 914(e), and interest.

At the hearing, the parties stipulated that the various time requirements of the Act had been complied with and that no penalties were due or claimed. After having reviewed the evidence before him, the administrative law judge rejected these stipulations as contrary to fact. He found that the employer's Notice of Controversion was not dated until May 13, 1975, more than a month after the employer had knowledge of the claim-

ant's injury. Section 14(e) provides for the addition to the award of an amount equal to ten percent of the unpaid compensation, unless a Notice of Controversion was filed within fourteen days after the employer had knowledge of the injury, pursuant to Section 14(d), 33 U. S. C. § 914(d). Our review of the record indicates the administrative law judge's conclusions are clearly derived from the evidence before him and constitute a proper application of the relevant provisions of the Act.

The employer advances numerous arguments against this conclusion. For instance, it contends that it has "complied with the spirit of the Federal Act" by filing its Notice of Controversion within fourteen days of the filing of the injured worker's federal claim. As this Board has consistently held, Section 14(e) is clear on its face. The additional award is mandatory; it "shall be added . . . unless notice [of controversion] is filed under subdivision (d) of this section." Further, the employer contends that noncompliance should be excused in cases of first impression when the limits of federal jurisdiction are not yet clearly established. The answer to this contention is provided by the standard treatise in the workers' compensation field. "A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute." 3 Larson § 78.47 (1976). Section 14(e) provides for only two exceptions to the requirement of the additional ten percent award: The timely filing of the Notice of Controversion pursuant to Section 14(d) or excuse for nonpayment of compensation "owing to conditions over which [the employer] had no control." Where the employer has brought his case within neither exception the award is proper and mandatory.

The employer also relies upon the ruling in *Motteler* v. *J. A. Jones Construction Co.*, 457 F. 2d 917, 920 (7th Cir. 1972), that "employers are not required to . . . file forms controverting employee claims whether or not the injury is even remotely connected with activities on 'navigable waters' as required by the Act." In view of our discussion of the law above, we do not

find the nature of claimant's duties and place of his injuries to be so remote from navigable waters, as defined in the amended Act, as to bring it within the rule in *Motteler*.

The employer consistently refers to the additional award as a "fine" or "penalty" the imposition of which "partakes of harassment" and is "unreasonable, cohercive [sic], punitive, and therefore unconstitutional." In view of the very limited burden imposed upon the employer by the requirements of Section 14(d), we cannot agree with these characterizations and note only that the constitutionality of additional awards under this section was upheld in *Hardway Contracting Co.* v. *O'Keeffe*, 414 F. 2d 657 (5th Cir. 1968).

Finally, the employer contends that no interest should be assessed for those portions of the period between when the compensation was due and when it was paid where delays in the process of adjudication were attributable to either the Director, Office of Workers' Compensation Programs, or the administrative law judge. We have carefully reviewed the decision of the Fifth Circuit in *Strachan Shipping Company* v. *Wedemeyer*, 452 F. 2d 1225 (5th Cir. 1971), *cert. denied*, 406 U. S. 958 (1972), sanctioning the imposition of interest. We find no such exceptions as those requested by the employer here in that decision nor do we believe that it would be consistent with the policy considerations underlying that decision to create such exceptions.

Accordingly, the third issue raised by the employer on appeal must also be answered in the affirmative and the actions of the administrative law judge sustained by the Board.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

Dated this 4th day of January 1977.

APPENDIX D.

U. S. DEPARTMENT OF LABOR.
Office of Administrative Law Judges.
Suite 700 — 1111 20th Street, N. W.
Washington, D. C. 20036.

In the Matter of

WILLIE A. GRAHAM,
Claimant,

vs.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

Case No.
76-LHCA-326
OWCP No. 5-10730

Stuart R. Gordon, Esq.
Howell, Anninos, Daugherty & Brown
808 Maritime Tower
Norfolk, Virginia 23510
For the Claimant.

Luther G. Jones, III, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
1800 M Street, N. W.
Washington, D. C. 20036
For the Employer and Carrier.

William J. Kilberg, Solicitor of Labor
Laurie M. Streeter, Associate Solicitor
Francine K. Weiss, Attorney
U. S. Department of Labor
Suite N-2716
Washington, D. C. 20210
Director, Office of Workers' Compensation Programs.

Before: JULIUS A. JOHNSON
Administrative Law Judge

DECISION AND ORDER.

This action has been brought to obtain compensation for temporary total disability under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. §§ 901, *et seq.* (hereafter, the "Act"). A formal hearing was conducted on March 4, 1976 in Norfolk, Virginia.

Statement of the Issue.

Whether Claimant, injured in a shipyard shop while removing an alignment piece for a sonar shield preparatory to its installation on a submarine in a nearby shipway, was an "employee" engaged in maritime employment in an area adjoining navigable waters and customarily used for shipbuilding within the meaning of Section 2(3) and 3(a) of the Act?

Statement of the Case.

On April 3, 1975 Claimant sustained a low back strain while working as a "chipper" in a submarine shop located approximately twelve hundred feet from the navigable James River. The shop was one of numerous assembly, machine, pipe, outfitting, and other shops and plants in the shipyard which Employer utilized for the construction and repair of seagoing vessels. (Employer's Exh. 2) The submarine shop was used primarily for the building of component ship parts from raw and fabricated materials. One of Claimant's functions as a "chipper" was to remove temporary attachments from the component parts and at the time of his injury he was chipping off a flat bar—an alignment piece—for a sonar shield so that it could be further prepared for installation on a submarine in a nearby shipway. By rail, the submarine was approximately nineteen hundred feet from the shop.

The parties have stipulated that if the Act is determined to be applicable here, Claimant would be entitled to receive compensation for temporary total disability from April 17, 1975 to April 20, 1975 and from June 28, 1975 to July 27, 1975 based upon an average weekly wage of $225.60. (Joint Exh. 1) Payments totalling $351.000 have been paid to Claimant pursuant to an agreement under the provisions of the Virginia Workmen's Compensation Act. (Employer's Exh. 1) A brief of the Employer and memoranda on behalf of Claimant and the Office of Workers' Compensation Programs have been submitted and considered in this matter.

Discussion.

Employer contends that Claimant does not satisfy the "status" requirement of an "employee" within the meaning of Section 2(3) of the Act because he was not engaged in maritime employment, that is, shipbuilding. It is further contended that Claimant does not meet the "situs" requirement under Section 3(a) because his work was confined to the submarine shop, a place geographically adjoining navigable waters but not, as the argument goes, an area "customarily used . . . in . . . building a vessel." (Employer's br., pp. 41-48)

Employer's contentions do not survive close scrutiny. The reasoning underlying both the "status" and "situs" contentions is logical—accepting Employer's premises—but unrealistic: "shipbuilding . . . is . . . assembling components *on a shipway or in a drydock* which results in those components becoming one entity"; "[s]hipbuilding *does not* include the construction of component parts"; the submarine shop where Claimant worked only produced component parts and therefore Claimant was not involved in shipbuilding. (Employer's br., pp. 42, 43) (Emphasis added.)

It is sufficient to note that Section 2(3) of the Act defines "employee", as pertinent here, as "any person engaged in maritime employment . . . including any harbor-worker", such as a "shipbuilder." (33 U. S. C. § 902(3)) Undeniably, Employer is in the business of ship construction. As a "chipper" in the

submarine shop, Claimant removed temporary attachments on component parts for their installation aboard ship. Employer's own witnesses with practical views as to the nature of Claimant's work consistently recognized that this procedure was necessary in shipbuilding. Only convenience—or happenstance—placed it a few hundred feet beyond the shipway. Claimant's work was clearly an essential aspect of the Employer's shipbuilding enterprise and accordingly must be deemed maritime employment within the meaning of the Act. See *Nulty* v. *Halter Marine Fabricators, Inc.*, 1 BRBS 437 (May 2, 1975); *Skipper* v. *Jacksonville Shipyards, Inc.*, 1 BRBS 533 (June 11, 1975); *Maxin* v. *Dravo Corp.*, 2 BRBS 372 (Oct. 20, 1975).

The instant case is indistinguishable from the facts in a recent decision of the Benefits Review Board. In *Morgan* v. *Ingalls Shipbuilding Corp.*, BRB No. 75-159 (Mar. 19, 1976), the Board determined that a ship fitter-helper-apprentice in a fabrication shop used for cutting, shaping, tacking, and welding steel parts later used in ship construction and repair, met the requirements of Section 2(3).

As to the "situs" requirements under Section 3(a) and Claimant's usual confinement of work to a shop twelve hundred feet from navigable waters, it is only necessary to find any "adjoining area" customarily used for shipbuilding. (33 U. S. C. § 903(a)) An "adjoining area" as defined in the Act must be regarded as bounded only by the limits of its use as a maritime enterprise. See *Morgan* v. *Ingalls Shipbuilding Corp., supra.* Employer's entire facility—not merely the shipway or drydock—was designed and used for ship construction and repair. See Employer's Exh. 2. The submarine shop where Claimant worked was an integral part of many shipyard shops and plants utilized by Employer in building and repairing vessels near the navigable James River. Under these circumstances, the "situs" requirements of Section 3(a) are satisfied. See *Maxin* v. *Dravo Corp., supra; Perdue* v. *Jacksonville Shipyards, Inc.*, 1 BRBS 297

(Jan. 31, 1975); *Skipper* v. *Jacksonville Shipyards, Inc., supra; Morgan* v. *Ingalls Shipbuilding Corp., supra.*

Jurisdiction is appropriate under the Act.

Findings of Fact and Conclusions of Law.

I. Claimant was an "employee" within the meaning of Section 2(3) of the Act at the time of his injury on April 3, 1975 based upon his work as a "chipper" in Employer's submarine shop.

II. Claimant's work in the submarine shop located twelve hundred feet from the James River was performed in an area adjoining navigable waters and customarily used in shipbuilding within the meaning of Section 3(a) of the Act.

III. Claimant is entitled to receive compensation for a temporary total disability from April 17, 1975 to April 20, 1975 and from June 28, 1975 to July 27, 1975 based upon an average weekly wage of $225.60, less any payment under Virginia statute. Interest is payable. *Strachan Shipping Co.* v. *Wedemeyer*, 452 F. 2d 1225 (5th Cir. 1971).

IV. Employer is liable for all medical expenses related to Claimant's injury on April 3, 1975.

V. The application of Claimant's counsel, Stuart R. Gordon, for the award of an attorney's fee in the amount of $175.00 is reasonable and approved.

ORDER.

I. Employer shall pay to Claimant compensation for temporary total disability from April 17, 1975 to April 20, 1975 and from June 28, 1975 to July 27, 1975 based upon an average weekly wage of $225.60, less any payment made under Virginia statute, with interest of six percent per annum from the date each payment was due until paid.

II. Employer shall pay for all medical expenses related to Claimant's injury on April 3, 1975.

III. Employer shall pay directly to Stuart R. Gordon, Esquire, the sum of $175.000 for legal services rendered on behalf of Claimant in this matter.

/s/ JULIUS A. JOHNSON,
Julius A. Johnson,
Administrative Law Judge.

Dated: April 27, 1976
Washington, D. C.

APPENDIX E.

U. S. DEPARTMENT OF LABOR.
Office of Administrative Law Judges.
Suite 700 — 1111 20th Street, N. W.
Washington, D. C. 20036

In the Matter of

GEORGE E. JONES,
Claimant,

vs.

NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY,
Self-Insured Employer,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest.

Case No.
76-LHCA-78
OWCP No. 5-10728

H. Duncan Garnett, Jr., Esquire
Jones, Blechman, Woltz & Kelly
2600 Washington Avenue (P. O. Box 78)
Newport News, Virginia 23607
For the Claimant.

Robert H. Joyce, Esquire
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, Illinois 60603
For the Employer.

William McL. Ferguson, Esquire
Shannon T. Mason, Esquire
Ferguson & Mason
225 28th Street (P. O. Box 251)
Newport News, Virginia 23607
For the Employer.

William J. Kilberg, Solicitor of Labor
Laurie M. Streeter, Associate Solicitor
Francine K. Weiss, Attorney
U. S. Department of Labor
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Before: CHARLES F. SIMON
Administrative Law Judge

DECISION AND ORDER.

Statement of the Case.

Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act), and the Rules and Regulations promulgated thereunder (20 C. F. R. Parts 701 and 702), this matter was heard before me on November 20, 1975, in Norfolk, Virginia. The Claimant and self-insured Employer were represented by counsel at the trial. The interests of the Director, Office of Workers' Compensation Programs, were represented by the Office of the Solicitor, United States Department of Labor, by means of a post-hearing brief.

Both Claimant and Employer were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument, and to present briefs. Briefs have been submitted. After the hearing Employer submitted a 159 page 6″ x 9″ book entitled "Tenneco Directors and Officers" which has been marked Joint Exhibit 15 and received into

evidence. Tenneco, Inc. is the parent company of Employer. Counsel for Claimant has filed a statement of services rendered to Claimant in support of an award of attorney's fees. These documents have been duly considered and are hereby made a part of the record in this case. Based upon the entire record herein and my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law, and Order.

Issues.

The basic issue presented by this case is jurisdiction. If jurisdiction is found, the liability of Employer for compensation, medical costs, penalties, interest and attorney's fees, become issues for consideration.

Stipulations.

Counsel for the parties have stipulated and it is so found: (1) Claimant was an employee of Employer on April 11, 1975, when he sustained an injury which arose out of and in the course of his employment, (2) the Employer received timely notice of the injury, (3) there was a causal relationship between the employment and the injury, (4) Claimant's average weekly wage at the time of the injury was $208.42, and (5) Employer has paid all medical, surgical and hospital costs. Counsel also stipulated that the various time requirements of the Act have been complied with, and that there are no penalties due or claimed. However, the record shows that the Notice of Controversion was not timely filed, so these two stipulations are rejected as being contrary to fact.

Findings of Fact.

The Claimant, George E. Jones, was 57 years of age at the time of trial, is married, and has worked for over 25 years for Employer. He holds a rating as a "mechanic" and has, for the past 4 or 5 years, worked as an "oiler" in Employer's "foundry". He has previously worked in other parts of Employer's yard.

The foundry makes all kinds of castings for the repair and building of ships, including such items as missile tube castings, elbows, T's, valves, and stern frames. The foundry also produces HY 80, one of the hardest of metals, for use in construction of the new Trident submarines.

As a mechanic-oiler, Claimant's job is to lubricate all of the machinery in the foundry. He is part of Employer's 043 "maintenance" department which includes workers located all over the shipyard. Such workers, as a general rule, are not involved in actual production or fabrication of ships or parts of ships. Claimant is a member of the Peninsula Shipbuilder's Association, which is the union representing all the shipyard's hourly production workers.

On April 11, 1975, Claimant was greasing a large piece of equipment in the foundry known as a sand mill or sand mixer. As he raised up, his left shoulder hit the angle on the scales resulting in severe pain and dislocation of the shoulder. He went to the clinic, saw several doctors, and eventually returned to work on May 19, 1975. He has performed his work since then with no apparent difficulty.

Based on a claim made under Virginia law, Claimant received $481 for temporary total disability compensation, plus $1,820 based on a rating of 10 percent loss of use of his left arm (Joint Exh. 6). His claim under the Act is dated May 1, 1975 (Joint Exh. 7).

Employer was founded in 1886 and is one of the world's largest shipyards. It is now a major component of Tenneco, Inc., a large conglomerate (Joint Exhs. 13, 14, and 15). One of Employer's wholly owned subsidiaries is Newport News Industrial Corporation (NNI), organized originally to produce land-based nuclear reactors (Tr. 39). However, the production work of NNI has broadened substantially to include the manufacture and fabrication of industrial products out of steel and other metals, and various quality inspection and shock testing facilities (Tr. 39).

NNI maintains a separate identity with separate offices, physical properties, staff, bank account, etc., but there are a substantial number of officers and directors who serve in similar capacity for both NNI and Employer (Joint Exh. 15, pp. 24, 25).

In addition to the production of all necessary castings, etc., for Employer, Employer's foundry, where Claimant works, produces a very substantial variety and volume of products for NNI, which NNI uses in production for sale to other companies, many of which are not involved in shipbuilding. For example, customers of NNI which purchase items containing parts made by Employer's foundry, include Scott Paper Company, Allis Chalmers, Coppers Company, Hitachi America Ltd. and Westinghouse. Some of NNI's customers are shipbuilders.

Joint Exhibits 10 and 11 show direct hours worked in the foundry for different customers for April 11, 1975 and for the month of April, 1975. It was testified that April, 1975 was typical for the 12 months prior to the trial (Tr. 101). In April, 1975, 14.8 percent of the hours in the foundry were spent on production of castings, etc., for Employer with the balance, 85.2 percent, spent on production of items for NNI. 72.8 percent of total foundry hours went on products for NNI which were non-ship related (Joint Exh. 11). This gives a total of 27.2 percent of foundry time spent on ship related work for NNI and Employer. It is of some significance that the work done for NNI by Employer's foundry, is billed by the foundry to NNI at cost (Tr. 76, 82).

Joint Exhibits 13 and 14 are photographs of Employer's shipyard and witnesses have designated on the photographs the location of the foundry and other parts of Employer's yard (Tr. 53-59, 62-63, 65, 66, 84-92, 94, and 96-99). It appears that the foundry is about 2½ blocks from the water's edge or about 3000 feet (Tr. 59). Employer has warehouses and storage areas further from the water. The receiving area for the shipyard and the pattern ship which supplies patterns for the foundry, are

in the same general area and about the same distance from the water. Although there are two public streets between the foundry and the water, there is direct access to the water for rail cars, trucks and pedestrians under these streets. It is obvious from the photographs and the testimony that Employer's shipyard is a unified, integrated complex of buildings, etc., devoted to marine construction. The different areas are contiguous and adjacent to each other in spite of their being intersected by public streets.

Conclusions of Law.

1. Prior to the 1972 Amendments to the Act, geographical "situs" alone was controlling with respect to coverage, and there was no reference to the type of work being performed. If an employee was injured or killed on the "navigable waters of the United States" he was covered if he was working for an employer who had any employee engaged in maritime employment. It did not matter whether the claimant himself was engaged in maritime employment, if the situs test was met. *Peter* v. *Arrien*, 325 F. Supp. 1361 (E. D. Pa.), *aff'd*, 463 F. 2d 252 (3rd Cir. 1972); *Calbeck* v. *Travelers Insurance Company*, 370 U. S. 114 (1962); *Pennsylvania R. R. Company* v. *O'Rourke*, 344 U. S. 334 (1950).

Extension of coverage landward was accomplished by three of the 1972 Amendments to the Act. Section 3(a) of the Act, 33 U. S. C. § 903(a), now provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

The definition of "employer" was also expanded to cover the same specified adjoining shoreside facilities, and the definition

of "employee" was restricted to embrace only persons engaged in maritime employment, 33 U. S. C. 902(3) and (4).

Accordingly, the net effect of these 1972 Amendments was to expand "situs" to include adjoining shoreside facilities, and to contract "status" to require that an employee be engaged in maritime employment in order to be covered by the Act. Employer contends that Claimant was not engaged in maritime employment and was not working in an "adjoining area".

2. *Claimant was engaged in maritime employment and therefore qualifies as an "employee" under Section 2(3) of the Act.*

Section 2(3) of the Act reads as follows:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel. . . .

It is obvious from the statute that ship repairmen and shipbuilders are involved in maritime employment and are "employees" covered by the Act. *Benedict* on Admiralty, comments as follows on this provision:

> In order to leave no room for any doubt, longshoremen and persons performing longshoring operations are specifically included, and so are harbor workers, ship repairmen, shipbuilders, and shipbreakers so that in the case of such persons, it is quite unnecessary to engage in any abstract discussion of the term "maritime employment." *Benedict* on Admiralty, Volume 1A, Section 16, pages 2-3 (1973 ed.).

The Employer herein does not question its status as an "employer" engaged in "maritime employment" under Section 2(4) of the Act. Therefore, it necessarily must concede that *some* of its employees are engaged in maritime employment. Employer's argument is that *this Claimant*, who is employed by Employer, does not do the kind of work which qualifies as "maritime em-

ployment". Employer is attempting to draw a line at some stage in the process of shipbuilding and ship repairing, which would exclude persons from coverage by the law, who are not directly involved in actual construction or repair of a ship. It is not clear just where Employer would draw the line, but the contention here is that a maintenance worker in a foundry located in a shipyard is not engaged in maritime employment. I do not agree.

Employer's own witness testified that the work done by the foundry is a necessary and essential part of Employer's shipbuilding operation (Tr. 105). The end products of the foundry are essential parts of ships and Claimant's task of maintaining in operating order, machinery necessary for continued formation of essential parts for ship repair and new ship construction, is an essential part of Employer's maritime building operations.

The actual fabrication of parts by the foundry is clearly maritime employment under the authority of *Nulty* v. *Halter Marine Fabricators, Inc.*, 1 BRBS 437 (May 2, 1975), *appeal docketed*, No. 75-2317 (5th Cir., filed May 20, 1975), and *Maxin* v. *Dravo Corporation*, 2 BRBS 372 (1975), *appeal docketed*, No. 75-2403 (3d Cir., filed December 16, 1975). In *Nulty* the claimant was a carpenter who was injured while working in the carpentry shop fabricating a block to hold a spare wheel for an off-shore supply vessel which was afloat in navigable waters about 100 yards from the shop area. *Maxin* involved injury of an employee whose work involved the cutting of steel plates in Employer's structural shop where pre-assembly of components was carried out. In both cases the claimant was held to be a "shipbuilder" and hence an "employee" under Section 2(3) of the Act. Also see *Morgan* v. *Ingalls Shipbuilding*, BRB No. 75-159 (3-19-76).

In this case the Claimant is a maintenance worker who oils and greases all the machinery in the foundry, a function obviously essential to the operation of said machinery.

A maintenance worker in a shipyard has been held to qualify as an "employee" under the Act in *Kininess* v. *Alabama Dry Dock and Shipbuilding Company*, 75-LHCA-316 (1975). In the *Kininess* case the claimant was performing maintenance work on a shoreside crane, a machine essential to shipbuilding. The Administrative Law Judge stated as follows (Decision and Order, p. 10):

> . . . there is ample basis for drawing a conclusion that Claimant's service at the time of his injury, falls within the purview of Section 2(3) of the Act because of the inherent maritime nature of the work he was performing when injured. The crane in question was being readied for a vital role in the improvement of the Employer's business of ship repair and shipbuilding. In this regard the crane became operational shortly after the accident. Thus, the Claimant's work on the crane was clearly in furtherance of the Employer's special economic interests in this field of endeavor. Again, his principal duties at the time of the injury were an essential aspect of the Employer's ship repair and shipbuilding enterprise, and thus for this reason, his duties, however described, must be classed as "maritime employment" within the meaning of Section 2(3) of the Act. *Skipper* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-213 (June 11, 1975); *Nulty* v. *Halter Marine Fabricators, Inc.*, BRB No. 74-179 (May 2, 1975).

Workers who do maintenance work related to longshore operations but who are not directly involved in the loading or unloading of cargo, have also been held to be "employees" within the coverage of the Act. *Vinciquerra* v. *Transocean Gateway Corporation*, 1 BRBS 523, BRB No. 75-125 (June 10, 1975); *Bradshaw* v. *J. A. McCarthy, Inc.*, 3 BRBS 195, BRB No. 75-209 (Jan. 26, 1976); *Vitale* v. *Maher Terminals*, 3 BRBS 467, BRB No. 75-267 (May 5, 1976). In the *Bradshaw* case the Benefits Review Board stated as follows (Decision, p. 4):

> . . . The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included

in the broad concept of maritime employment 33 U. S. C. § 902(3).

Similarly the maintenance of foundry machinery (carried out by Claimant), which is essential to the fabrication of essential parts for ships, is included in the broad concept of maritime employment. In *Buehler* v. *Toledo Lakefront Dock Company,* 74-LHCA-277 (5-20-75), *modified on other grounds,* 75 BRB 247 (1976) the claimant, like Claimant in this case, was an "oiler". His assignment was to take care of lubrication of automatic and semi-automatic machinery used to load coal from box cars onto ships. The Administrative Law Judge determined that the claimant was an "employee" under the Act and this issue was not appealed.

Employer argues that in April of 1975 (which is declared to be a typical period), only 27.2 percent of the direct man-hours of the foundry went into production of products to be used in shipbuilding. 14.8 percent of said man-hours went into production of ship parts for Employer and 12.4 percent of said man-hours went into production of ship parts sold to NNI, Employer's wholly-owned subsidiary, for resale to other shipbuilders. This leaves 72.8 percent of foundry man-hours for non-ship-related products. I do not consider these facts to be of significance in this case. If the foundry was entirely or almost entirely used for non-ship-related production we might have a different situation, but here the foundry is essential to Employer's shipbuilding and repair operation and just happens to have the capacity to produce non-ship-related items. 27.2 percent of ship-related work is not insubstantial. The non-ship-related work done by the foundry does not remove its employees, including Claimant, from the ranks of maritime employment.[1]

1. Once a claimant is deemed to be an "employee" his employer is automatically an "employer" under Section 2(4) of the Act. *Ford* v. *P. C. Pfeiffer Co., Inc.,* 1 BRBS 367 (1975).

3. *Claimant's injury occurred in Employer's foundry which is located in an "adjoining area" customarily used by Employer in repairing or building a vessel.*

Turning to the question of whether the Claimant meets the situs test of Section 3(a) of the Act, it must be noted initially that the Benefits Review Board has held that the phrase, "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. . . .", clearly indicates that the Congress intended to extend shoreward the reach of the maritime law so as to include shoreside injuries previously covered by state workmen's compensation laws. *Avvento* v. *Hellenic Lines,* BRB No. 74-153 (November 12, 1974). More importantly, we now have a series of cases which clearly constitute authority for the principle that the term "adjoining area" as used in Section 3(a) should not be given a narrow and limited construction so as to restrict the situs of an injury either to an area immediately adjacent to navigable waters or to an area located within a certain distance of the water's edge. *Adkins* v. *I. T. O. Corporation of Baltimore,* BRB No. 74-123 (November 29, 1974); *Perdue* v. *Jacksonville Shipyards, Inc.,* BRB No. 74-200 (January 31, 1975); *O'Leary* v. *Southeast Stevedore Company,* BRB Nos. 74-228 and 74-228A (May 30, 1975).

Further guidance in construing Section 3(a) is now provided by a series of cases holding that the 1972 Amendments were intended to avoid the inequities of coverage precipitated by an employee walking into and out of the scope of the Act during the work day. *Herron* v. *Brady Hamilton Stevedore Company,* BRB No. 74-171 (1-23-75); *Perdue* v. *Jacksonville Shipyards, Inc., supra; O'Leary* v. *Southeast Stevedore Co., supra; Johns* v. *Sea-Land Service, Inc.,* BRB No. 75-124 and 75-124A (July 11, 1975).

In analyzing Section 3(a), the Administrative Law Judge in *Maxin* v. *Dravo Corporation*, 74-LHCA-298 (1975) stated that:

> [W]hen reading the amended language in the light of the legislative history, there appears to be little question that shipbuilding on land was intended by Congress to be covered by the Act. This is so even though there is no specific definition of maritime employment in the Act, and even though shipbuilding on land may not, historically have been a maritime activity. Having reached this conclusion we feel that the factors of distance from the water's edge, and separation from it by a public road, must be considered in the light of the phrase "other adjoining area customarily used by an employer in building a vessel." (Decision, p. 11.)

The judge found that the employer's facility adjoined navigable waters. Therefore, since the whole facility was a "unified, integrated industrial plant devoted to marine construction", an injury on the premises would be within an "adjoining area", in spite of its distance from the water's edge or the incidental fact that a public road ran through the premises.

The Benefits Review Board, in affirming, held that

> An adjoining area as defined by the Act must be deemed bounded only by the limits of its use as a maritime enterprise. This entire facility is designed and used for new ship construction [although for 'other manufacturing activities' as well]. (2 BRBS at 375).

The shipyard in which the Claimant worked adjoined navigable waters; it was one integral facility; hence it was, in its entirety, an "adjoining area", notwithstanding that some *parts* of the area were, when considered by themselves, substantial distances from the water's edge.

Analogous facts exist in the instant case. Although the employer's facility is one of the largest shipyards in the world, its several divisions work together in the shipbuilding process. For instance, the pattern shop sends the foundry patterns for making

molds for its castings (Tr. 83-84). After the castings are made they are stored before being installed on the vessel or brought to the machine shop for additional machining before final installation (Tr. 52-53). The maintenance division, in which Claimant works, reflects this integration, as its employees work on machinery all over the shipyard (Tr. 21-22). Although several public roads intersect the premises, it is possible to walk from the foundry, which is one of the buildings furthest from the water's edge, without leaving the employer's premises (Tr. 29). In view of the Benefits Review Board's clear position that the Acts' location-of-injury requirement is not to be restricted to small areas immediately adjacent to navigable waters, Claimant's injury in the foundry must be viewed as occurring within an area—the shipyard—which adjoins navigable waters.

4. The record reflects (ALJ Exh. 1, Joint Exhs. 3, 5 and 6 and Tr. 34) that Claimant was temporarily and totally disabled during the period starting April 12, 1975 and continuing through May 18, 1975 (5 2/7 weeks) and that thereafter he returned to work and has continued working since. Joint Exhibit 5 shows that as of September 9, 1975, it was established that Claimant had a 10 percent permanent loss of use of his left arm as a result of the injury of April 11, 1975. Accordingly, Claimant is entitled to temporary total disability compensation for 5 2/7 weeks under Section 8(b) of the Act and 10 percent of the scheduled award provided for the loss of one arm under Section 8(c)(1) of the Act, with payments for permanent partial disability to start on September 9, 1975. In making payment for such compensation Employer is entitled to credit for amounts paid to Claimant under Virginia State Workmen's Compensation Law (Joint Exh. 6).

Compensation for Claimant's permanent partial disability is based on a maximum of 312 weeks for loss of use of his left arm [Section 8(c)(1)] at the rate of $138.95 per week. Since partial loss of use is compensable in a proportionate amount equal to the percentage of loss of use of the entire arm [Section

8(c)(19)], I conclude that, on the basis of 10 percent of the schedule period, Claimant is entitled to permanent partial disability compensation for 31.2 weeks at the rate of $138.95 per week, totalling $4,335.24.[2]

5. Since the compensation due under the Act exceeds that paid under Virginia law, Claimant is entitled to interest at the rate of 6 percent per annum computed from the date each payment of additional compensation was originally due.

6. Claimant is also entitled to reimbursement and/or payment by Respondents of the reasonable cost of such necessary medical care and treatment as the nature of Claimant's injury has required or may require.

7. Section 14(e) of the Act provides that when any installment of compensation payable without an award is not paid within 14 days after it is due, there shall be added a 10 percent penalty unless the Employer filed a Notice of Controversion pursuant to Section 14(d), with the Deputy Commissioner, or the payment is excused by a showing that the payment could not be made as a result of conditions beyond the Employer's control. In spite of stipulations of Counsel that the time requirements of the Act have been complied with and that no penalties are claimed or due (Tr. 9), Joint Exhibit 8 shows that Employer's Notice of Controversion is dated May 13, 1975, more than a month after Employer had knowledge of Claimant's injury. Such Notice does not excuse late payment under 14(e) unless it is filed with the Deputy Commissioner on or before the 14th day after Employer has knowledge of the injury. In view of Employer's failure to comply with Section 14(d), an assessment of a 10 percent penalty pursuant to Section 14(e) of the Act is mandatory.

8. Pursuant to 20 C. F. R. 702.132, Counsel for Claimant has filed an application for an attorney's fee in the total amount

2. All computations provided for in this Decision and Order will be made by the Deputy Commissioner in accord with its terms. All computations set forth herein are subject to verification by the Deputy Commissioner.

of $1145. Employer's attorney has raised no objections to the fee claimed. The application shows a total of 26¼ hours of time spent on this case including 6 hours of trial time charged at $50 per hour ($300). This leaves 20¼ hours of out-of-court time to be charged at $40 per hour ($810). Using Counsel's own rate and time figures, the total claimed should be $1110. Section 702.132 of the Regulations provides that "Any fee approved shall be reasonably commensurate with the actual necessary work performed and shall take into account the capacity in which the representative has appeared, the amount of benefits involved and the financial circumstances of the Claimant." Taking the foregoing into consideration together with pertinent provisions of Section 28 of the Act (33 U. S. C. 928), I hereby approve a fee of $1110.

ORDER

1. Employer shall pay Claimant compensation for temporary total disability at the rate of $138.95 per week starting April 12, 1975 and running through May 18, 1975, a total of 5 and 2/7 weeks, less temporary total disability payments already made under Virginia law, plus interest at the rate of 6 percent per annum, computed from the date each deficiency of payment was originally due until paid.

2. Employer shall pay Claimant compensation for a 10 percent permanent partial disability of the left arm at the rate of $138.95 per week commencing on September 9, 1975, and continuing thereafter for a period of 31.2 weeks, less permanent partial disability payments already made under Virginia law, plus interest at the rate of 6 percent per annum computed from the date each deficiency of payment was originally due until paid.

3. Compensation due and unpaid to the date of this Order shall be paid forthwith in a lump sum, including interest as set forth above.

4. Employer shall pay for or reimburse Claimant for such reasonable medical services and supplies as the nature of his injury has required or may require.

5. Employer shall pay Claimant, as additional compensation pursuant to Section 14(e) of the Act, an amount equal to 10 percent of each unpaid compensation installment that is due and payable.

6. Employer shall pay directly to H. Duncan Garnett, Jr., Esquire, the sum of $1110 for legal services rendered on behalf of Claimant.

/s/ CHARLES F. SUIOR

Dated: June 23, 1976

Washington, D. C.

Supreme Court, U. S.
FILED
SEP 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

GEORGE E. JONES, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

WILLIE A. GRAHAM, and DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Respondents.

BRIEF OF RESPONDENT GEORGE E. JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

E.D. David
JONES, BLECHMAN, WOLTZ & KELLY P.C.
2600 Washington Ave., Suite 700
P.O. Box 78
Newport New, Virginia 23607
Counsel for Respondent
George E. Jones

INDEX

OUESTION PRESENTED 1
STATEMENT OF THE CASE 1
REASON FOR DENYING THE WRIT 4
CONCLUSION 10

CITATIONS

Cases:

Alford v. American Bridge Division, U.S. Steel Corporation,
7 BRBS 484 (1978) 7,8

Buller v. American Bridge Division, U.S. Steel Corporation,
7 BRBS 481 (1978) 7

Cardillo v. Liberty Mutual Insurance Company,
330 U.S. 469, 478-79 (1947) 9

Dravo Corp. v. Banks,
567 F.2d 593 (3d Cir. 1977) 7

Dravo Corp. v. Maxin,
545 F.2d 374 (3d Cir. 1976), *cert denied*, 97 S. Court 2973
(1977) 5

Ingales Shipbuilding Corporation v. Morgan,
551 F.2d 61 (5th Cir. 1977), *cert denied*, 98 S. Court 508
(1977) 7,8

Jackson Shipyards, Inc. v. Perdue,
539 F.2d 633 (5th Cir. 1976) 5,7

Kininess v. Alabama Dry Dock and Shipbuilding
4 BRBS 13, (1976) 4

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249, 271 (1977) 5,6,9

O'Leary v. Brown-Pacific-Maxin Inc.,
340 U.S. 504, 508 (1951) 9

Stockman v. John T. Clark & Sons of Boston
539 F.2d 264 (1st Cir. 1976) 5

Thames Towboat Co. v. The Schooner Francis McDonald,
254 U.S. 242 (1920) 6

Tucker v. Alexandroff,
183 U.S. 424 (1902) 6

Voris v. Eikel,
346 U.S. 328 (1953) 9

Weyhauser Co. v. Gilmore,
528 F.2d 957 (9th Cir. 1976),*cert denied*, 429 U.S. 865 (1976), 6

Statutes:

Longshoremen's and Harbor Workers' Compensation Act,
33 U.S.C. §902(3) 1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,
Petitioner,

v.

GEORGE E. JONES, and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS, U.S. DE-
PARTMENT OF LABOR,
Respondents.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,
Petitioner,

v.

WILLIE A. GRAHAM, and DIRECTOR OF OFFICE OF
WORKERS' COMPENSATION PROGRAMS, U.S. DE-
PARTMENT OF LABOR,
Respondents.

BRIEF OF RESPONDENT, GEORGE E. JONES, IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI

QUESTION PRESENTED

The foundry is an essential part of a shipbuilding operation. Respondent, George E. Jones, is employed in the foundry of the largest new shipbuilder in the United States and is

charged with the responsibility of maintaining the machinery in the foundry in working order. The question presented is whether such an employee is engaged in maritime employment and/or is a shipbuilder with in the meaning of Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act?

STATEMENT OF THE CASE

George E. Jones is employed by the Newport News Shipbuilding and Dry Dock Company, hereinafter "Newport News Shipbuilding." Jones has been employed by Newport News Shipbuilding for over 25 years; the last four or five of which have been spent in the foundry.

Basically, the foundry makes castings for the repair and building of ships to include such items as mistletube castings, elbows, T's, valves andstern frames. Stern frames, for example, are among the first and most basic items made and installed in the process of building a ship. The foundry also produces HY80, one of the hardest metals, for use in the construction of the new Trident submarine. The foundry and the pattern shop make up one division of the Shipyard which is headed by one individual. The pattern shop obviously furnishes the foundry the patterns necessary t' the construction of the molds, etc., for pouring castings and other items made in the foundry.

The foundry is an integral part of shipbuilding and ship repair and is geographically and functionally connected to the machine shops , receiving, warehouses, fabricating and the ship's berthing and dry dock areas. Castings destined for the waterfront for machining and/or installation aboard ship go by truck and flat car via the roadway and railroad tracks which connect the foundry to all parts of the Shipyard. While the actual distance of the foundry is approximately two and a half

blocks or three thousand feet from the water's edge, the foundry 's integration in the shipbuilding process prompted the Administrative Law Judge to make the following remarks:

> For instance, the Pattern Shop sends the Foundry patterns for making molds for its castings. After the castings are made they are stored before being installed on the vessel or brought to the Machine Shop for additional machining before installation. The maintenance division, in which Claimant works, reflects this integration, as its employees work on machinery all over the Shipyard. Although several public roads intersect the premises, it is possible to walk from the Foundry, which is one of the buildings furthest from the water's edge without leaving the employer's premises.

The essential nature of the foundry to the shipbuilding operation was conceded by a company witness.

Q "Do you know, Mr. Sawyer, whether the work done by the foundry is an essential part of building an ship?"

A "Yes, sir."

Q "In other words, does a ship need a -- does a ship-yard need a foundry or does it need to hire the work done by somebody?"

A "That's correct."

Q "That work needs to be done by a shipyard?"

A "It needs to be done."

Q "So that the foundry operation, you would testify, I take it, is an essential part of the shipbuilding operation of the Newport News Shipbuilding and Dry Dock Company?"

A "I would say it's a part of Shipbuilding and Dry Dock Company."

Q "Well, it's necessary. I believe you said that."

A "It's necessary."

(T-105)

In addition to the items made in the foundry for use by Newport News Shipbuilding, the foundry also produces other items for sale to other companies through its wholly owned subsidiary. These other items may or may not be ship-related. Although the amount of ship-related work fluctuates with the work load, approximately 27 percent of the work performed in the foundry on the day George Jones was hurt was directly related to shipbuilding and ship repair work.

Jones carried the rate of a first class mechanic and his job in the foundry consisted of oiling and greasing and generally maintaining the equipment in operable fashion.

Q "Now, the oilers would oil and grease all of the equipment and machinery in the foundry, wouldn't they?"

A "That is correct."

Q "And, of course, it would be perfectly apparent that, if a machine isn't oiled and greased, it won't function?"

A "That's correct."

(T-93)

Based on these facts the Administator Law Judge found that:

> Claimant's task of maintaining in operating order, machinery necessary for continued formation of essential parts for ship repair and new ship construction, is an essential part of Employer's maritime building operations.

The Benefits Review Board specifically affirmed that finding and noted:

> This Board has previously held a shipyard worker injured in the course of maintaining equipment to be engaged in "maritime employment" as a shipbuilder when such equipment was utilized in the employer's shipbuilding and repairing operations. *Kininess v. Alabama Dry Dock and Shipbuilding Company*, 4 BRBS 13, BRB No. 75-275 (May 18, 1976).

Based on these facts the Fourth Circuit held that "Jones's maintenance work was as essential to the utilization of machinery as the work of machine operators." Since in the Fourth Circuit view "Jones's maintenance was essential to keeping the shipyard machineries in working order for the construction of ships" the Court concluded that Jones was a shipbuilder within the meaning of the Act.

Petitioner now asks this Court to reverse the unanimous determinations of three reviewing tribunals.

REASONS FOR DENYING THE WRIT

THE COURT SHOULD NOT GRANT A WRIT WHERE ALL OF .THE REVIEWING COURTS HAVE ENUNCIATED ESSENTIALLY THE SAME PRINCIPLE WHICH IS TO BE APPLIED IN DETERMINING WHETHER AN INDIVIDUAL IS ENGAGED IN SHIPBUILDING OR SHIP REPAIR. THIS COURT SHOULD NOT BURDEN ITSELF WITH APPLYING THE APPLICABLE LEGAL PRINCIPLE TO VARIOUS FRACTUAL DETERMINATIONS.

As pointed out in the brief of the Respondent in the companion case, each reviewing court that has dealt with attempting to define "shipbuilder" and "ship repairman" has concentrated its inquiry on determining whether the activity of the employee in question was "an integral step in the process,"[1] was an "integral part" of the shipbuilding operations [2] or "were directly involved" [3] or some similar inquiry. In point of fact this Court held that a checker was a longshoremen because his task was "an integral part of the unloading process . . ." *Northeast Marine Terminal Co. v. Caputo*,. 432 U.S. 249, 271 (1977).

What the Petitioners complain about as being an inconsistent position of the Circuit Courts and Benefits Review Board and the Administrative Law Judges is really an application of this now uniform principle to the various factual situations which are raised in the Act. There will be a myriad of circumstances in which an individual is working in a shipyard, either as a shipbuilder or a ship repairman. So long as the law is that the person's employment must be an integral part or directly involved or similar test phrase, then the necessary guidance has been accomplished and this Court should not make the mistake of reviewing the application of that principle to certain factual determinations.

---

[1] *Stockman v. John T. Clark & Sons of Boston*, 539 F.2d 264 (1st Cir. 1976)

[2] *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert denied*, 97 S. Ct. (1977)

[3] *Jackson Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976)

The cases on which the Shipyard relies to demonstrate a conflict in circuits upon a proper analysis demonstrate no conflict whatsoever. In *Weyhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert denied*, 429 U.S. 865 (1976), the Ninth Circuit held that a "pondman" who sorted logs for a lumber mill was not engaged in maritime employment simply because the pond on which he was working was navigable.[4] This decision is clearly correct and the broad language about the employee's work having a significat relationship to "traditional maritime activity involving navigation and commerce on navigable waters" has no application to the instant case. This is especially true since shipbuilding, which is clearly covered, has not been considered a traditional maritime activity. *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242 (1920); *Tucker v. Alexandroff* 183 U.S. 424 (1902) (a "vessel was, prior to launching, mere pieces of wood and iron and as much a land structure as a houe.")

As much as the Company would like to limit the application of the Act to "navigation and commerce," it is clear that the 1972 Amendment enlarged the coverage of the Act. *Northeast Marine Terminal Co. v. Caputo. supra* 263-64.

---

[4]The Ninth Circuits's exposition of what was involved exposes the inapplicability of the case:

> The full significance of the Law Judge's reference to "the log pond" is more readily appreciated with an understanding of a Northwesterner's common knowledge of a sawmill's log pond operation. The "log pond" is a universal adjunct to a sawmill and is either: (1) an artificial lake or pond dug or banked in dry uplands and fed by well or imported water, or (2) a log boom or other type of partitioned area of a stream, bay or other self-supplying body of water. The "log pond" of either type is maintained and sued solely for the utilitarian flotation method of holding, sorting, balding, and ultimate guidance of saw logs to and upon sub-surface chain conveyors which carry the saw log out of the log pond into the mill's sawing operation.
>
> We find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as "maritime employment" in the traditional sense.

Similarly Newport News Shipyard's reliance on *Dravo Corp. v. Banks*,. 567 F2d 593 (3d Cir. 1977) and *Jacksonville Shipyards, Inc. v. Perdue, supra*, is misplaced and establishes the point being made in this brief in opposition that what the Shipyard really wants this Court to do is to apply accepted principles to various factual situations. Both the Third Circuit and Fifth Circuit examined the employee's activity at the time he was hurt to determine whether it was an integral part of the shipbuilding process. In *Banks* the Third Circuit concluded that ice removal operations were not an intgral part of shipbuilding. In *Perdue* the Fifth Circuit determined that the dismantling of a fabrication shop in a disused marine facility in order to salvage steel for use in constructing a plant which would manufacture sandblasting equipment was not an integral part of a repairman's job.

Applying the "integral part" standard, the Fifth Circuit in the same case, concluded that another employee, Nulty, was entitled to the benefits of the Act when he was hurt in a fabrication shop some three hundred feet away from where the ship was berthed. At the time he was hurt Nulty was building a piece of woodwork to be on a ship which had been installed launched, but not yet commissioned. Similarly the Third Circuit applying these principles found coverage for an employee working in a fabrication shop on steel plates which were ultimately to be installed and used in a barge. *Bravo Corp. v. Maxin*, 545 F.2d 374 (3rd Cir. 1976).

Petitioner represents that "developing confusion" is apparent from the recent decisions in *Ingalls Shipbuilding Corporation v. Morgan*, 551 F.2d 61 (5th Cir. 1977), *cert denied*, 98 S. Court 508 (1977) and *Alford v. American Bridge Division, U.S. Steel Corporation*, 7 BRBS 484 (1978) and *Buller v. American Bridge Division, U.S. Steel Corporation*, 7

BRBS 481 (1978). To state the facts of each case puts the lie to the statement that these cases demonstrate either inconsistency or confusion. In *Morgan, supra,* the Fifth Circuit held that an employee who was killed while cleaning a steel plate which was being fabricated for installation in a ship was "directly involved in an ongoing shipbuilding operation." The standard applied by the Court certainly is consistent with that uniformly applied by every tribunal that has dealt with the issue.

The Benefits Review Board denied the benefits of the Act to a climant working as a welder for an employer which is in the steel fabrication business. The employer made

> . . . structural steel parts for everything from the Superdome in New Orleans, Louisiana, to component modules for vessels which were destined for incorporation into the final assembly of a vessel in New York or Virginia, to steel structures for bridges. The employer does not maintain, and has not maintained, a ship-building facility at its Orange, Texas, plant since 1965. The employer does not perform any aspect of shipbuilding other than the fabrication of component modules which are to be assembled, along with other modules, into a complete vessel by other companies in New York or Virginia. Employer does not have the capability or the facilities at its Orange, Texas, plant to perform the various stages required in construct-ing a vessel. *(Alford v. American Bridge Division, supra,* at 489)

No disparity is indicated by those decisions.

It might be said that since only 27 percent of the Foundry's machines were used for ship-related work on the day in question, that Jones is not entitled to coverage when he maintained the machines for non-ship related work. We think this Court's opinion in *Northeast Terminal* puts that issue to rest.

> Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that congress intended to eliminate. (*Id.* at 274)

The problem posed by these cases is to define what a ship-builder and ship repairman are for purposes of coverage in the Act. All of the reviewing Courts and Administrative agencies have settled on a test which asks whether the employee's activity at the time he was injured was an "integral part" of the shipbuilding or ship repair process. That type of inquiry is obviously consistent with the Congressional intention to broaden the situs of coverage of this Act from navigable waters to land-based activities. The enunciation of this principle is also consistent with this Court's admonition, reemphasized in *North east Marine Terminal Co. v. Caputo, supra,* at 335, that the Act is to be liberally construed to favor injured workers. *Voris v. Eikel,* 346 U.S. 328, 333 (1953). Futhermore, the principle being applied by the reviewing tribunals is consistent with the statutory presumption that an individual claim comes within the Act's coverage, Title 33 U.S.C. 290 (a).

Also this Court must remember that the "integral part" standard has been established by the Benefits Review Board. This Court has long held that so long as there is a reasonable legal basis for the Board's conclusions they will not be disturbed on appeal. See *O'Leary v. Brown-Pacific-Maxin Inc.*, 340 U.S. 504, 508 (1951), *Cardillo v. Liberty Mutual Insurance Company,* 330 U.S. 469, 478-79 (1947).

CONCLUSION

For the reasons stated herein the Petition should be denied.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY, P.C.
E.D. David
2600 Washington Ave, Suite 700
P.O. Box 78
Newport News, Virginia 23607

September 1, 1978

Supreme Court, U. S.
FILED
JUN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs

GEORGE E. JONES, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs

WILLIE A. GRAHAM AND DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR
Respondents.

BRIEF OF RESPONDENT WILLIE A. GRAHAM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Stuart R. Gorden
HOWELL, ANNINOS, DAUGHERTY & BROWN
808 Maritime Tower
Norfolk, Virginia 23510
Counsel for Respondent Willie A. Graham

INDEX

	Page
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR DENYING PETITION	5
CONCLUSION	9
CERTIFICATE	9

CITATIONS

Cases:

Dravo Corp. v. Banks, 567 F.2d 593 (3d. Cir. 1977). 7

Dravo Corp. v. Maxin, 545 F.2d 374 (3d Cir. 1976) cert. denied 97 S.Ct. 2973 (1977). . . . 6,7

Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977) cert. denied, 98 S.Ct. 508 (1977) 7

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976). 7

Nacirema Operating Co., Inc. v. Johnson, 396 U.S. 212 (1969) 5

Northwest Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977). . . 5

Sea-Land Service v. Director,
Office of Wrkrs' Comp., etc.
540 F.2d 629 (3d. Cir. 1977) 6

Stockman v. John T. Clark & Sons
of Boston, 539 F.2d 264 (1st. Cir.
1976). 6

Weyerhauser Co. v. Gilmore, 528 F.2d
957 (9th Cir. 1976), cert. denied
429 U.S. 868 (1976) 8

Statutes:

Longshoremen's and Harbor Workers'
Compensation Act, 33 U.S.C.§902(3) . 3

Longshoremen's and Harbor Workers'
Compensation Act, 33 U.S.C.§902(4) . 3

Longshoremen's and Harbor Workers'
Compensation Act, 33 U.S.C.§903(a) . 2

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND
DRYDOCK COMPANY,

Petitioner,

v.

GEORGE E. JONES and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,

Respondents.

NEWPORT NEWS SHIPBUILDING AND
DRYDOCK COMPANY,

Petitioner,

v.

WILLIE A. GRAHAM and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,

Respondents.

BRIEF OF RESPONDENT, WILLIE A. GRAHAM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the respondent, Willie A. Graham, was an "employee" within the meaning of the term in the Longshoremen's and Harbor Workers' Compensation Act when he sustained an injury when working as a "chipper" in a shop in the Petitioner's shipyard while he was working on a sonar shield to be installed on a submarine in a shipway approximately 1900 feet from the ship.

STATUTE INVOLVED

The relevant portion of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 3(a), 86 Stat. 1251, 1256, 33 U.S.C. §903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from the injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.) * * *

Section 2(3), 86 Stat. 1251, 33 U.S.C. §902(3):

> The term "employee" means only persons engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and a harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. §902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT OF THE CASE

The claimant, Willie A. Graham, an employee of Newport News Shipbuilding and Drydock Company, sustained a low back strain on April 3, 1975, while working as a "chipper" in a submarine shop located approximately 1200 feet from the navigable James River. The shop was one of numerous other shops and plants in this shipyard utilized by the employer for the construction and repair of seagoing vessels. The submarine shop was used primarily for the building of component ship parts from raw and fabricated materials. At the time of the injury, the claimant was working as a "chipper", removing a flat bar (an alignment piece) from a sonar shield so that it could be further prepared for installation on a submarine in a shipway approximately 1900 feet from the shop. The claimant, Willie A. Graham, testified that the activities conducted in the submarine shop involved the construction of parts that go into the building of a ship, and that at the time he sustained the injury complained of, was working on a sonar shield which would be delivered for installation in a ship. Numerous witnesses for the Petitioner testified that the activities of the claimant were "necessary" to the building or repairing of a ship, and that it was not necessary for a person to be working aboard a vessel in order that he be considered contributing to the building of that vessel.

THERE IS NO GOOD REASON TO GRANT REVIEW

Petitioner contends that review should be granted to the decision of the United States Court of Appeals for the Fourth Circuit because of what the Petitioner perceives as inconsistencies and conflicts surrounding the definition and application of "maritime employment." In fact, the case was correctly decided by the United States Court of Appeals for the Fourth Circuit in accord with the principles enuciated by this Court in Northwest Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977). A reading of the Caputo case clearly reveals that this Court, in addressing itself to the issue, discussed an overwhelming number of the cases cited by the Petitioner and found no conflict between the various Circuit Courts except for the Fourth Circuit, which has now adjusted its position in conformity with the Supreme Court decision in Caputo.

In response to the inequities brought by Nacirema Operating Company v. Johnson, 396 U.S. 212, (1969), Congress enacted amendments to the Longshoremen's and Harbor Workers' Compensation Act, which require a claimant to satisfy both the "status" and "situs" requirements in order to gain the benefits of the Act.

The Fourth Circuit is clearly in accord with all of the other circuits and the decision of this Court holding that the 1972 amendments of the Longshoremen's and Harbor Workers' Act enlarged the "situs" so as to provide compensation for injuries occurring at designated shoreside facilities as well as on shipboard.

The First Circuit, in Stockman v. John T. Clark & Sons of Boston, 539 F.2d 264, (1st. Cir. 1976), held that the "situs" is not to be limited only to "those areas directly adjoining the berth of a specific vessel" but included those locations which are "customarily used" in loading and unloading vessels. Only those areas of waterfront which only have some "incidental connection with navigable waters" were to be outside the situs test.

The Court placed great emphasis on rejecting labels and that it was "the nature of the work being performed" that was determinative and that where the activity was an integral step in the process of unloading a vessel, the Act was satisfied.

The Third Circuit, in Sea-Land Serv. v. Director, Office of Wkrs' Comp., etc., 540 F.2d 629 (3rd Cir. 1976), referring to the enumerations of the various areas set forth in the Act, held that these enumerated areas are not to be exclusive, but that as long as the "employment nexus" with maritime activity is maintained, the Longshoremen's and Harbor Workers' Act should be applicable.

In another decision of the Third Circuit, Dravo Corp. v. Maxin, 545 F.2d 374 (3rd Cir. 1976) Cert. denied, 97 S.Ct. 2973 (1977), the Court adopted language similar to that utilized by this Court in holding that the Act was applicable where the activities conducted were "an integral part" of the Dravo's shipbuilding operations.

Dravo Corp. v. Maxin, supra, is clearly distinguishable from and consistent with the decision of the Third Circuit in Dravo Corp. v. Banks, 567 F.2d 593 (3rd Cir. 1977), cited by the Petitioner where an employee was denied benefits, when he was injured performing ice remover operations as part of the plant maintenance. The activity was clearly not an "integral part" of the process of vessel construction but was an activity conducted by any business.

The Fifth Circuit addressed the issue in Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), in ruling that a claimant working in a fabrication shop about 300 feet from a ship in which the propeller on which he was working would be installed, was covered under the Act. The reasoning of the Court in awarding benefits to the worker handling maritime cargo on shore as well as a carpenter fabricating parts for a new ship, while denying coverage to an employee engaged in tearing down a shop in a disuse marine repair facility, is not only consistent with the standard promulgated by the Fifth Circuit, but is in accord with the other circuits which have faced the question.

In another Fifth Circuit decision, Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977) cert. denied 98 S.Ct. 508 (1977), the Court, consistent with its earlier decision and those of the other circuits, ruled that an employee was covered by the Act notwithstanding that at the time of the injury the claimant was engaged in cleaning rather than constructing, since cleaning was

"a necessary prerequisite" to the fabrication of the steel for use in shipbuilding.

The fact that the claimant never went aboard a vessel as pointed out by the Petitioner is not only of no importance, but is not a factor in determining whether his activity is a "necessary prerequisite" or an "integral part" of shipbuilding.

The Ninth Circuit, in Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1976) cert. denied 429 U.S. 868 (1976), the Court found that an employee, to be eligible, must have been doing work which had a "realistically significant relationship" to traditional maritime activity.

Each of the above Circuit Courts, including the Fourth Circuit, appear to be consistent with each other, adopting numerous tests to determine whether the employment is a maritime employment. Whether such language involves "an integral part", "directly involved" or a "necessary prerequisite", the essence of the determination is the same. A review of each of these decisions reveals that they are consistent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STUART R. GORDON
Howell, Anninos,
Daugherty & Brown
808 Maritime Tower
Norfolk, Virginia
23510

Counsel for Respondent,
Willie A. Graham

June 20, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 1978, copies of the foregoing Brief in Opposition were mailed, postage pre-paid, to all counsel of record for the Petitioner. I further certify that all parties required to be served have been served.

STUART R. GORDON

Counsel for Respondent,
Willie A. Graham

Supreme Court, U.S.
FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1765

In the Supreme Court of the United States

OCTOBER TERM, 1978

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

GEORGE E. JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

LINDA L. CARROLL,
Attorney,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

GEORGE E. JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 573 F. 2d 167. The opinions of the Benefits Review Board (Pet. App. B1-B4 and C1-C9) are reported at 5 B.R.B.S. 7 and 5 B.R.B.S. 323. The decisions of the administrative law judge (Pet. App. D1-D6 and E1-E16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1978. The petition for a writ of certiorari was filed on June 12, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act provides compensation to all employees integrally involved in a shipbuilding operation.

STATEMENT

1. Petitioner operates a shipyard in Newport News, Virginia. The shipyard is engaged in every aspect of shipbuilding and ship repair work, and the assembly process takes place in several locations. Some parts or pieces are fashioned in land-based shops and subsequently refined and installed at shipways, where the vessels are assembled (Pet. App. D2, E4-E6).

Willie A. Graham was employed by petitioner as a "chipper" in its submarine shop. The submarine shop, which is one of several assembly shops in petitioner's shipyard, is used primarily for building or fabricating parts to be installed on submarines. Graham's duties were to remove temporary attachments from parts undergoing fabrication and to cleanse scars and welds so that the parts could be finished and then installed aboard vessels. Graham injured his back while working on a sonar shield that was later transported to petitioner's shipway and installed in the reactor room of a submarine (Pet. App. A3, D2).

George E. Jones had been employed by petitioner for 25 years prior to his injury on April 11, 1975. Throughout his employment, Jones had been a mechanic and had been assigned to various duties throughout the shipyard, including work aboard vessels (Pet. App. A3, E3-E4). On the day of his injury, he was assigned to petitioner's foundry shop, where his duties included oiling and lubricating machines used in constructing vessel components (Pet. App. A4). In addition to producing parts

for use in ship construction, the foundry also produces both ship-related and non-ship-related items (Pet. App. E5).

2. Following their injuries, Jones and Graham filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.* The administrative law judges awarded recovery to both claimants (Pet. App. D1-D6, E1-E16), and the Benefits Review Board affirmed both awards (Pet. App. B1-B4, C1-C9). On petitioner's petition for review, the court of appeals affirmed (Pet. App. A1-A8). The court held that both Jones and Graham were engaged in shipbuilding, within the meaning of Section 2(3) of the Act, 33 U.S.C. (Supp. V) 902(3). Graham was a shipbuilder, the court held, because he was engaged in an integral part of the process of constructing a submarine (Pet. App. A4). Jones also met the statutory status requirement, the court held, because his maintenance work was essential to keeping the shipyard's machinery in working order for the construction of ships (Pet. App. A5-A6). Since both Graham and Jones were working in petitioner's shipyard, the court found that both were injured at a maritime "situs," and were thus covered by Section 3(a) of the Act, 33 U.S.C. (Supp. V) 903(a) (Pet. App. A3-A4).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other court of appeals.

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. (Supp. V) 902(3), provides that the Act covers "any person engaged in maritime employment, including any * * * shipbuilder * * *." The courts have uniformly held

that any person engaged in employment directed toward the production and assembly of a vessel and its component parts is a "shipbuilder" for the purposes of the Act. See *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (C.A. 5), certiorari denied *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty,* 433 U.S. 908; *Dravo Corp.* v. *Maxin,* 545 F. 2d 374 (C.A. 3), certiorari denied, 433 U.S. 908; *Ingalls Shipbuilding Corp.* v. *Morgan,* 551 F. 2d 61 (C.A. 5), certiorari denied, 434 U.S. 966. Shipbuilding includes not only the production process but also the maintenance of the machinery used in the production process. *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess,* 554 F. 2d 176 (C.A. 5), certiorari denied, 434 U.S. 903; see also *Bradshaw* v. *McCarthy,* 3 B.R.B.S. 195, petition for review denied, 547 F. 2d 1161 (C.A. 3).

Petitioner contends that Jones and Graham were not "shipbuilders" but were engaged instead in "routine support services * * * not directly related to the construction of ships" (Pet. 3).Yet Graham's work—removing attachments of component vessel parts during their fabrication—was an integral part of the shipbuilding process. His tasks were necessary steps in the process of constructing a part for installation in a submarine. Jones' work—maintaining machines used in the fabrication of vessel parts—also was essential to petitioner's shipbuilding operations. He serviced the machines that were directly involved in the construction of ships.

Petitioner further asserts (Pet. 7-11) that the decision in this case conflicts with decisions of the Third, Fifth, and Ninth Circuits. The decisions on which petitioner relies, however, apply the same legal principles that were applied by the court in this case and are distinguishable on their facts. In *Dravo Corp.* v. *Banks,* 567 F. 2d 593 (C.A. 3), the court of appeals held that an unskilled laborer injured while spreading salt on ice-covered walkways in the area

of a shipbuilding operation was not a "shipbuilder." As the court below noted, there is a substantial difference between Banks' unskilled general labor, which was not integrally related to the shipbuilding process, and Jones' work, which involved maintenance of the machinery directly used in the construction of ships.

The Fifth Circuit's decison concerning claimant Skipper in *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* is even less apposite. Skipper, although ordinarily a shipbuilder, was injured while dismantling a metal shop some distance from any active shipbuilding location. The court held that Skipper's work, at the time he was injured, was non-maritime in nature and was being done at a non-maritime situs. As we have pointed out above, the decision in *Jacksonville Shipyards* concerning claimant Nulty strongly supports the decision here; Nulty's case and that of respondent Graham are almost identical.

Finally, *Weyerhaeuser Co.* v. *Gilmore,* 528 F. 2d 957 (C.A. 9), certiorari denied, 429 U.S. 868, on which petitioner relies, did not involve construction of the term "shipbuilder" at all. The claimant, a "pondman" at an Oregon sawmill, was injured when he fell from a floating walkway near the dock area of the sawmill. The court held that his work was not "maritime employment" within the meaning of the Act.

The decisions in *Gilmore, Banks,* and Skipper's case thus do not conflict with the decision of the court of appeals here. Although petitioner asserts (Pet. 11-13) that a recent decision of the Fifth Circuit conflicts with two decisions of the Benefits Review Board on the question of what constitutes "shipbuilding," resolution of any conflict that may arise among those decisions should await review of the Board's decisions in the courts of appeals. A simple

difference of opinion between an agency and a court in some other case is not a sufficient reason to grant review in this case, in which agency and court are in accord.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

LINDA L. CARROLL,
Attorney,
Department of Labor.

AUGUST 1978.

DOJ-1978-08